TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 227

JOSE MATOS, PETITIONER,

vs.

ALONSO HERMANOS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED JULY 24, 1936.

CERTIORARI GRANTED OCTOBER 12, 1936.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [Caption omitted]

IN DISTRICT COURT FOR THE JUDICIAL DISTRICT OF SAN JUAN, PUERTO RICO

Civil No. 11,143

ALONSO HERMANOS and JOSE RAMON and MANUEL ALONSO MUNOZ, Plaintiffs,

v.

JOSE MATOS, Defendant

Inexistence of Contract and Cancellation of Entries

COMPLAINT—Filed December 12, 1929

To the Honorable Court:

Now come Alonso Hermanos by its managing partners, Jose Roman and Manuel Alonso Munoz, who also appear in their private capacity, by their undersigned attorneys and bring this complaint against Jose Matos, and respectfully allege and set forth:

(a) That Alonso Hermanos is, and was on the first of [fol. 2] March, 1929, a civil agricultural partnership domiciled in the municipality of Rio Piedras, Puerto Rico, constituted by a public deed executed before the notary public of Bayamon, Enrique Marquez Huertas, the sole members thereof being Jose Ramon and Manuel Alonso Munoz, who appear in its behalf as well as privately, and constitute themselves into plaintiffs.

(b) That the defendant is a farmer and a resident of San Juan.

(c) That on March 1, 1929, Jose Matos on the one side and Alonso Hermanos, by its managing partners Jose Ramon and Manuel Alonso Munoz on the other, stipulated and covenanted as follows:

(1) Jose Matos was at the time owner and possessor of a herd of cattle, composed of 122 head of different nature, race, gender, ages and color, which he was to sell and totally sold to Alonso Hermanos for the lump sum of $18,000.

(2) Alonso Hermanos was to accept and took possession of the said 122 head of cattle, the price of which was to be paid in the following manner:

By paying, as it did, in cash on the date of the contract, to Jose Matos, the sum of	$3,000.00
By paying, as it did, the total price of an urban piece of property which Jose Ramon Alonso Munoz had sold to Jose Matos for the account of Alonso Hermanos, the price of which the former left in the possession of the latter as part payment of said cattle, as appears from public deed No. 71, executed April 3, 1929, before notary public of Bayamon, Enrique Marquez Huertas	5,000.00
Total	$8,000.00

The remaining ten thousand dollars were to be paid by Alonso Hermanos to Mr. Matos within two years, expiring March 1, 1931, with interest at 9 percent per annum, payable monthly after the same became due.

(3) That Jose Ramon and Manuel Alonso Munoz by virtue of their common interest in the business of Alonso Hermanos would secure the payment of the obligation for ten thousand dollars above mentioned with a voluntary mortgage on private property of their own, which mort- [fol. 3] gage they constituted by public deed No. 72 of April 3, 1929, executed before notary public of Bayamon, Enrique Marquez Huertas, on the following properties:

(a) Urban Property belonging to Jose Ramon Alonso Munoz, that is a lot with a front measure of 12 meters on Las Flores Street, Santurce, municipality of San Juan, and with 19 meters and 85 centimeters on its northern side, bounding with house number 56 of Octaviano J. Herrera; with 12 meters on the west and bounding with Ricardo Danes; and with 20 meters on the south and bounding with house number 52 of Octaviano J. Herrera; the area thereof being 239 square meters and 10 square centimeters. This lot contains a zinc roofed, one-story, reenforced concrete house, with garage and servants' quarters in the yard, and marked number 54 of the street mentioned.

And two properties of Manuel Alonso Munoz the description of which is as follows:

(b) Urban: Lot measuring 20 meters and 55 centimeters on the north; 20 meters 35 centimeters on the south; 12 meters on the east and west, or a total area of 245 square meters and 40 square centimeters; bounding on the north with lot number 18 of Octaviano J. Herrera; on the east with Las Flores Street and on the west with property of Jacinto Caballero. This lot is situated on the northern part of the ward of Santurce, municipality of San Juan, and contains a zinc roofed, one-story, reenforced concrete house, with garage and servants' quarters in the yard, and is marked number 16 of said street.

(c) Lot of 20 meters and 60 centimeters on the north, bounding with lot number 20 of Octaviano J. Herrera; of 20 meters, 55 centimeters on the south; and bounding with lot number 16 of Octaviano J. Herrera; of 12 meters on the east and bounding with Las Flores Street and of 12 meters on the west and bounding with Jacinto Caballero; its area being 246 square meters and 90 centimeters. This lot contains a zinc-roofed, one-story, reenforced concrete house, with garage and servants' quarters in the yard, and is marked number 18 Las Flores, Northern Santurce, San Juan.

[fol. 4] This mortgage was recorded in the Registry of Property of San Juan, first section:

As to property letter (a), at page 208 of volume 101, of Northern Santurce, property number 5122, fifteenth entry.

As to property letter (b), at page 54 of volume 104, of Northern Santurce, property number 5257, sixth entry.

And as to property letter (c), at page 56, of volume 104 of Northern Santurce, property number 5258, sixth entry.

(d) That on the first of March, 1929, when the sale of the above-mentioned cattle took place, the latter were apparently in good condition and that no notice was then given to the contrary by the defendant to the plaintiffs, who, having no knowledge of or experience in veterinary matters, were unable to discover at sight whether said cattle were suffering from any hidden disease.

(e) That long before the first of March, 1929, according to plaintiff's information and belief formed subsequently to said date, the herd of cattle sold by Jose Matos to Alonso Hermanos were suffering from tuberculosis, which is a contagious disease, and that, on information and belief,

from the 18th of March to December 6, 1929, out of the 122 head of cattle which constituted the aforesaid herd, 43 have died of said disease, to wit:

March 18th, one white and black cow;
18th, one dark yellow;
18th, one yellow;
24th, one light brown;
24th, one black and white;
27th, one light gray;
27th, one white;
27th, one black and white;
27th, one dark brown;
April 4th, one black and white;
4th, one yellow;
7th, one yellow and white;
19th, one dark brown, without horns;
23d, one dark brown and gray;
30th, one yellow with a protuberance in the jaw;

[fol. 5]

April 30th, one light gray;
May 14th, one light yellow;
23d, one light brown;
June 10th, one black;
25th, one black;
July 3d, one dark gray;
3d, one yellow;
3d, one spotted yellow;
15th, one dark brown;
20th, one black;
20th, one dark brown;
August 3d, one black with white spots;
19th, one black and white, named "La Policia";
19th, one dark brown and white, known as Guernsey;
Sept. 8th, one dark brown;
Sept. 30th, one yellow;
Oct. 18th, one dark brown and yellow;
25th, black and white (one);
Nov. 16th, one light gray;
Nov. 19th, one light gray;
20th, one dark brown and yellow;
21st, one dark gray;

Nov. 25th, one black;
26th, one dark brown and white;
30th, one black and white;
Dec. 1st, one light gray;
3d, one dark gray;
6th, one black and white.

And, further, after tuberculine, which is a test to determine the presence of tuberculosis in cattle, was applied by an official of the Health Department of Puerto Rico, it was found that 29 head more of the herd sold to Alonso Hermanos by Jose Matos were affected also by tuberculosis, contracted while the animals were in the possession of the defendant, according to plaintiffs' information and belief.

[fol. 6] (f) That the plaintiffs stand ready and willing to return to the defendant (and they hereby offer to do so) all of the surviving cattle which are a part of the entire herd sold to plaintiffs as above alleged on March 1, 1929, by Mr. Matos.

Wherefore the plaintiffs pray the court to enter judgment in due course declaring null and void, in accordance with Section 1397 of the Revised Civil Code, the contract for the sale of cattle to which averment letter (c) of the complaint refers, entered into by Jose Matos on the one side, and the agricultural civil partnership Alonso Hermanos and Jose Ramon and Manuel Alonso on the other side, under date of March 1, 1929, as well as the collateral mortgage constituted by the said Jose Ramon and Manuel Alonso Munoz in favor of Jose Matos by deed number 72, of April 3, 1929, before the notary public of Puerto Rico, Enrique Marquez Huertas, decreeing furthermore:

(1) That the Registrar of Property of San Juan, first section, cancel and set aside the entries made in the registry by reason of the mortgage deed hereinbefore mentioned as to property letter (a) above described, at page 208 of volume 101 of Northern Santurce, property number 5122, fifth entry; as to property letter (b) at page 54 of volume 104 of Northern Santurce, property 5257, sixth entry; and as to property letter (c) at page 56 of volume 104 of Northern Santurce, property No. 5258, sixth entry; and

(2) That Alonso Hermanos recover from the defendant the sum of $8,000, equivalent to the money paid in cash on account of the contract for the sale of the cattle mentioned in this complaint.

(3) That the defendant pay the costs and the disbursements of this action, including a reasonable sum as attorney's fees of the plaintiff.

San Juan, Puerto Rico, December 11, 1929.
Carlos del Toro Fernandez, E. Marquez, Attorneys for the Plaintiff.

Duly sworn to by Jose R. Alonso. Jurat omitted in printing.

[fol. 7] [File endorsement omitted.]

IN DISTRICT COURT OF SAN JUAN

[Title omitted]

MOTION TO STRIKE OUT—Filed January 13, 1930

Now comes the defendant by its undersigned attorney and respectfully states and prays:

That the following particulars and paragraphs be stricken out from the complaint filed in the above-entitled case:

(a) From paragraph letter (d) the following:

"no notice was then given to the contrary by the defendant to the plaintiffs, who, having no knowledge of or experience in veterinary matters, were unable to discover at sight whether said cattle were suffering from any hidden disease."

(b) Paragraph letter (f) should be totally stricken out. It reads thus:

"That the plaintiffs stand ready and willing to return to the defendant (and they hereby offer to do so) all of the surviving cattle which are a part of the entire herd sold to plaintiffs as above alleged on March 1, 1929, by Mr. Matos."

[fol. 8] Grounds

The paragraphs of the complaint whose elimination is prayed for are redundant and irrelevant, and immaterial to the action herein brought. The complaint is based on Section 1397 of the Revised Civil Code.

(a) The notice that the defendant gave or that he failed to give to the plaintiffs, or the knowledge acquired subsequently to said date, can in no wise modify or alter the situation of facts that in accordance with the law may only give rise to a cause of action when said facts exist at the time the contract is entered into, provided the corresponding action is brought before the prescription of said right.

(b) Referring to paragraph letter (f) of the complaint we reproduce the same argument: It does not matter that the plaintiffs stand ready and willing or not, or that they offer to return or not, the cattle alleged to have survived. What a party stands ready to do after the execution of a contract is a fact subsequent to the celebration of the contract itself and in a case like the present this averment changes in no wise the situation of facts contemplated by the statute and existing at the time of the execution of the contract. Aside from that, the return of the things which are the object of the contract would be a corollary to the nullity or rescission of a contract in a proper case and that averment would be rather a question of law or the anticipation to the pronouncement of the judgment than a matter of pleading.

Wherefore the defendant prays this court that the elimination prayed for be ordered.

Rio Piedras for San Juan, Puerto Rico, January 11, 1930.

Heriberto Torres Sola, Attorney for the Defendant.

Copy served this thirteenth day of January, 1930.

C. del Toro Fernandez, Attorney for the Plaintiffs.

[File endorsement omitted.]

[fol. 9] IN DISTRICT COURT OF SAN JUAN

[Title omitted]

DEMURRERS—Filed January 13, 1930

Now comes the defendant by his undersigned attorney and files the following demurrers to the complaint herein:

(a) That the complainant does not state facts sufficient to constitute a cause of action against the defendant, among other reasons because the action herein brought has prescribed.

In effect, under paragraph letter (c) of the complaint, the contract and the possession of the 122 head of cattle are alleged as taking place on March 1, 1929. The complaint is dated November 11, 1929, that is, nine months eleven days subsequently to the sale. The term of forty days within which the plaintiffs should have brought their action in accordance with the provisions of Sections 1397 and 1399 of the Revised Civil [Code], has elapsed in excess from the date of the delivery of the cattle in question and in conformity with said sections the action of the plaintiffs, supposing that it ever existed, would have prescribed.

(b) That the complaint is ambiguous, unintelligible and uncertain.

Grounds

Paragraph letter (e) of the complaint avers that "long before the first of March, 1929, according to plaintiffs' information and belief, formed subsequently to said date, the herd of cattle sold by Jose Matos to Alonso Hermanos, were suffering from tuberculosis". The same paragraph alleges that from the 18th of March to December 6, 1929, out of the 122 head of cattle which constituted the aforesaid herd, 43 had died. It is not alleged in an affirmative manner that the said 43 head had died of tuberculosis. This averment states that 43 head had died of same, but the phrase "of same" cannot be plainly understood to refer "to the herd of cattle sold", or to the alleged tuberculosis, which is claimed to be a contagious disease. This fact must appear plainly, because an animal, the same as

a person, though affected by tuberculosis, may die from any other disease. The complaint does not plainly allege either that the herd of cattle in question were affected by [fol. 10] tuberculosis at the time of the sale. It is true that in the first paragraph the plaintiffs refer "to the herd of cattle sold", but it does not appear plainly that the whole herd was subjected to the tuberculine test and that the same was found to be suffering from tuberculosis. It is alleged that 122 head of cattle were sold, that 43 head thereof died, but it is not plainly stated of what they died from. That after tuberculine was applied (it is not stated whether the same was applied to the whole herd or to some other 29 head) were found to be affected also with tuberculosis. It appears from the complaint that the 29 head of cattle found to be affected with tuberculosis contracted while the animals were in the possession of the defendant, but it is not alleged that they were in the possession of the latter before the sale was consummated, or at the time of the sale, for if they acquired tuberculosis in the possession of the defendant (sic) after the sale, that would be an irrelevant fact, for the law refers to a contagious disease existing at the time of the sale. It does not plainly appear either whether the cattle which the plaintiffs offered to return to the defendant were affected or not with said disease, nor whether it was so affected at the time of the sale.

Wherefore the defendant prays this Honorable Court that the complaint herein be dismissed and that the plaintiffs be sentenced to pay the costs, disbursements and attorney's fees.

Rio Piedras for San Juan, Puerto Rico, January 11, 1930.

Heriberto Torres Sola, Attorney for the Defendant.

Copy served this thirteenth day of January, 1930.

C. del Toro Fernandez, Attorney for the Plaintiffs.

[File endorsement omitted.]

[fol. 11] IN DISTRICT COURT OF SAN JUAN

[Title omitted]

ORDER OVERRULING MOTION TO STRIKE AND DEMURRER—February 3, 1930

On the 20th ultimo the parties submitted to the consideration of the court the two questions raised by the defendant: a motion to strike out certain particulars of the complaint and a demurrer thereto for various reasons. Both parties have filed extensive briefs and counter-briefs.

As to the first ground of the demurrer, that is that the complaint does not state facts sufficient to constitute a cause of action, because from the face thereof it appears that the action has prescribed, as provided by Section 1397 of the Civil Code, the court overrules the same.

As to the second ground, that is the averment that the complaint is ambiguous, unintelligible and uncertain, the court finds no basis to sustain the same.

Coming now to the motion to strike out, the court finds that the particulars to which the defendant refers in his motion should not be stricken out, inasmuch as the former is a mere statement of the conditions of the plaintiffs and the second is an averment essential to the cause of action herein brought.

The demurrer as well as the motion to strike out are overruled and the defendant is granted a term of ten days to answer to the complaint.

Let the parties be notified.

Given in San Juan, Puerto Rico, this third day of February, 1930.

C. Llauger Diaz, District Judge.

The parties were notified this sixth day of February, 1930.

P. del Manzano, Clerk.

[fol. 12] IN DISTRICT COURT OF SAN JUAN

[Title omitted]

ANSWER TO COMPLAINT—Filed February 14, 1930

Now comes the defendant, Jose Matos, by his undersigned attorney, and, without prejudice to his defense of prescription raised by the demurrers against the cause of action of the plaintiffs, answers in a correlative manner the averments of the complaint, as follows:

(a) The defendant accepts from this paragraph of the complaint that Alonso Hermanos on March 1, 1929, was an agricultural civil partnership domiciled in the municipality of Rio Piedras, Puerto Rico, but, owing to lack of sufficient information and belief as to the remaining averments of this paragraph to be able to answer the same, the defendant denies that on the date of the filing of the complaint Alonso Hermanos was such agricultural civil partnership, domiciled in the municipality of Rio Piedras, Puerto Rico, and for the same reason he also denies that said partnership was constituted by a public deed executed before the notary public of Bayamon, Enrique Marquez Huertas, or before any other notary; and for the same reason he denies that Jose Ramon and Manuel Alonso Munoz are or were the sole members of said partnership, and accepts that they appear in the complaint in behalf of the partnership and also that in their private name they constitute themselves into plaintiffs.

(b) The defendant accepts paragraph letter (b).

(c) The defendant admits that on the date alleged in paragraph letter (c) of the complaint the defendant Jose Matos on the one side and Alonso Hermanos by its managing partners Jose Ramon and Manuel Alonso Munoz on the other, stipulated and covenanted the alleged sale of the cattle of which the former was owner and possessor, for the price and under the terms and conditions alleged by the plaintiff; he accepts that the plaintiffs paid to the defendant the $3,000 corresponding to the first instalment, which sum was to be paid in cash. The defendant accepts that the second instalment of $5,000 was paid by the plain-

tiffs with the total price of an urban property transmitted to him by deed No. 71 of April 3, 1929, executed before Notary Public Enrique Marquez Huertas; but the defendant rectifies the averment of the plaintiffs and states that [fol. 13] the transfer of said urban property to the defendant, made by virtue of said deed and the contract that gave rise thereto, was not a separate and independent transaction entered into between Jose Ramon Alonso Munoz and the defendant, but as part of the same transaction for the sale of cattle with Alonso Hermanos, on account of the price of which the defendant agreed to accept, as he did, as part payment, the value of the said urban property. The defendant accepts that Alonso Hermanos agreed to pay the remaining $10,000 within a term of two years, which was to expire on March 1, 1931, with interest at 9 percent per annum, payable monthly after their expiration.

The defendant also admits that Jose Ramon and Manuel Alonso Munoz secured the performance of the obligation for $10,000 above mentioned with the mortgage constituted in favor of the defendant by means of public deed No. 72 of April 3, 1929, before Notary Public Enrique Marquez Huertas, on the properties described in the complaint under letters (a), (b) and (c); and that said mortgage was recorded, as alleged, in the Registry of Property.

(d) The defendant accepts that on March 1, 1929, when the sale of the above cattle was made the same were not apparently in good condition as alleged by the plaintiffs, but on the contrary that the cattle were then really and effectively in good physical condition; the defendant accepts that he gave at the time no notice to the contrary to the plaintiffs because the cattle being in good condition and not suffering from many vice or disease occult or apparent, he was not bound to give any notice in that regard; and the defendant denies, owing to lack of sufficient information and belief on the subject, that the plaintiffs, having no knowledge or experience in veterinary matters, were unable to discover at sight whether the said cattle were suffering from any hidden disease, the defendant alleging on the contrary that no matter how expert the plaintiffs might have been on the subject they would never have been able to discover in any form any hidden disease or vice in that cattle at the time of the sale because said cattle at the time was suffering from no vice or disease whatever.

(e) The defendant denies that at any time or moment prior to March 1, 1929, or on the date of the sale and delivery of said herd of cattle sold by the defendant to Alonso [fol. 14] Hermanos the same were affected totally or partially by pulmonary consumption or from any contagious disease whatever; and the defendant denies that within the dates alleged in the complaint, or on any other dates, the 43 head of cattle alleged in paragraph (e) of the complaint, or any head whatever, have died from same.

The defendant also denies, owing to lack of sufficient information or belief, that after tuberculine, which is a test to determine the presence of tuberculosis in cattle, was applied by an official of the Health Department of Puerto Rico, or by any other person or officer, it was found that 29 head, or any number of head, of the cattle constituting the herd sold to Alonso Hermanos by the defendant, were affected also by tuberculosis or by any disease contracted while the animals were in the possession of the defendant. And on the contrary the defendant alleges that if by means of the tuberculine test alleged by the plaintiffs, or by means of any other test, some of the cattle sold by the defendant to them were found to be suffering from tuberculosis or from any other disease, such disease or diseases were contracted by the said cattle subsequently to the dates of the sale made by the defendant and while the said cattle were in the possession of the plaintiffs.

(f) Owing to lack of information or belief with regard to the facts alleged in paragraph (f) of the complaint, the defendant denies that the plaintiffs stand ready and willing, and that they offer to do so, to return all the surviving cattle which are a part of the entire herd sold by the defendant, as alleged by the plaintiffs, on March 1, 1929; the defendant alleging on the contrary that he is not bound to receive said cattle.

New Matter

As new matter constituting an opposition and defense, the defendant alleges:

1. That all the cattle which were the object of the contract of sale of March 1, 1929, mentioned in the complaint, entered into with the plaintiffs or with Alonso Hermanos, was purchased by the defendant and sold in good faith,

without any vice or disease occult or apparent; and that the said sale was made after an examination was practiced of the cattle by the plaintiffs, who received the same to their [fol. 15] entire satisfaction and who did not make to the defendant any claim whatever until the complaint therein was brought.

2. That if subsequently to the sale of said cattle some of them have happened to be affected by tuberculosis or by some other disease, the defendant has not contributed to the determining causes thereof, while the plaintiffs have so contributed with their negligence or carelessness in moving the said cattle from the property on which they were grazing to a property in Rio Piedras situated near the Insular Sanatorium, known as "La Ruina", lacking stables and adequate structures for a dairy, the same as sufficient pasture, proper shade trees and water, and with other animals.

3. That the plaintiffs have been negligent besides by giving an inadequate treatment to the cattle in question, by failing to feed the same conveniently and to protect them from the rain and the sun.

Special Defenses

1. That the complaint does not state facts sufficient to constitute a cause of action, specially so to determine an action based on the inexistence of a contract.

2. Given the hypothesis that the plaintiffs, or any of them, have had on any occasion a cause of action against the defendant the same has prescribed, inasmuch as the action has been brought after the expiration of 40 days from the date of the delivery of the cattle to the plaintiffs, as provided by Sections 1397 and 1399 of the Revised Civil Code.

Wherefore the defendant prays this Honorable Court that judgment be rendered in due course dismissing the complaint herein and sentencing the plaintiffs to pay the costs and attorney's fees.

San Juan, Puerto Rico, February 13, 1930.

Heriberto Torres Sola, Attorney for the Defendant.

Duly sworn to by Jose Matos. Jurat omitted in printing.

[fol. 16] Copy served this fourteenth day of February, 1930.

C. del Toro Fernandez, Attorney for the Plaintiffs.

[File endorsement omitted.]

In District Court of San Juan

[Title omitted]

Minutes of Ocular View

On June 21, 1930, the court went to "La Ruina", property belonging to the plaintiffs herein, in order to practice the ocular view prayed for by the parties. The latter, their attorneys and the officers of the court who sign these minutes were present.

Being on the property, the court notices the following: that the property is situated at a distance of about 200 meters, more or less from kilometer 16½ of the road leading from San Juan to Caguas.

In the stable—a zinc-roofed structure, mounted on steel posts—there are nine cows and a bull, which the parties accept are part of the cattle purchased from Mr. Matos. At a distance of 67.30 meters from the stable there is another structure measuring 60 by 40 feet, zinc roofed, supported on tree trunks and cocoanut palms. The west side of this structure is covered with boards, separated one from the other, the same as the south side, while the east and north sides thereof are covered with boards which are not separated. The court notices that the floor of this structure is of ground.

[fol. 17] From the place where these two stables are located to the Insular Sanatorium there is a distance which the parties figure at 6 or 7 kilometers.

The court examines also a brook which according to the parties produces the water used in the stables. The brook has an outlet that, the court notices, is fenced imperfectly, in order to avoid the cattle from coming near it. Close to the place just examined by the court there is a space, in the course of the brook, where there is an extension of water, through the middle of which the waters run, but remain still on the sides.

At the request of the defendant the court states that close to this place steps of animals are noticeable.

The defendant admits that below the place just described there is a watering place for cattle, in good condition, where steps of animals are also noticeable.

The court states, at the request of the defendant, that on this part of the property, close to the brook, the land is rugged and that there is found common or ordinary grass and some trees. The pasture of the rest of the property is equal to that of this section, except 15 acres of land which are planted to grass known as "elefante" and "malojillo". And the court makes to appear, at the request of the defendant, that there are on the property 122 head of cattle at large, grazing, independently from those in the stable, and that the "malojillo" and "elefante" grasses now growing are being resown and cut, respectively. On the banks of the brook there is some shade.

Flor del Valle Property

The ocular view continues in Flor del Valle property, of the municipality of Bayamon, and once on said property the court notices, at the request of the parties, that there is a stable, that is a zinc-roofed structure, measuring 100 feet long by 72 feet wide, with its four sides open, excepting a small part which is enclosed on the northwest. The court also notices that there are a number of canoes in the stable.

The parties state that in Flor del Valle property there is no running water and that the supply of water for the prop- [fol. 18] erty is obtained from a deep well installed within the stable above described. The floor of the stable is entirely of concrete, with two lateral ditches for drainage.

The parties state that there are 80 head of cattle in the stable.

The attention of the court is called to the fact that on the shores of the mangrove swamp, at a distance of 500 meters more or less from the stable, to the northeast, the skulls of three animals of the bovine race were found. Further ahead, and still on the shores of the mangrove swamp, the court notices a great number of bones and three skulls of animals, also of the bovine race, as well as the remains of two more of said animals. The parties make to appear that the land is plowed and that a skull and some bones are found on the land that has been plowed.

At a distance of 800 or 1000 meters from the stable the court notices three head of cattle on the shores of the mangrove swamps, and it is the defendant's desire that it be made to appear in these minutes that the shore close to the mangrove swamp has been plowed. Following the shores of the swamp, contiguous to the property and in the same direction above referred to, the court finds the skulls of 9 animals of the bovine race, as well as a great amount of bones, and that the land has been plowed, although sugar cane is not planted close to the mangrove swamp. Following the shores of the swamp the court also finds seven additional head of cattle. The whole property is level and is planted to sugar cane.

As it was 12.30 in the afternoon the court considers the ocular view at an end and the parties state that there is nothing else that they want to be made to appear in the minutes of this ocular view.

The court orders that these minutes of the ocular view be added to the record of this case as a part thereof.

San Juan, Puerto Rico, June 21, 1930.

C. Llauger Diaz, Judge. P. Del Manzano, Deputy Clerk. Gilberto Cordova Davila, Deputy Marshal. Carmelo G. Perez, Reporting Stenographer.

[fol. 19] IN DISTRICT COURT OF SAN JUAN

[Title omitted]

STATEMENT OF FACTS AND OPINION

From the admissions contained in the answer, the court finds the following facts: that Alonso Hermanos, the plaintiff herein, is and was on March 1, 1929, a civil agricultural partnership domiciled in the municipality of Rio Piedras, and that the defendant is a farmer and a resident of San Juan; that on March 1, 1929, the defendant and the plaintiffs, by its managing partners Jose Ramon and Manuel Alonso, covenanted and agreed the purchase and sale of 122 head of cattle for the lump sum of $18,000, of which sum $3,000 were paid in cash and $5,000 in an urban property, which the plaintiffs transferred to the defendant, and the

balance was to be paid in a term of two years, maturing on March 1, 1931, with interest at 9 percent per annum, and payable monthly at their expiration; that Jose Ramon and Manuel Alonso Munoz secured the performance of the obligation for $10,000 with a mortgage constituted in favor of the defendant, duly recorded.

The plaintiffs allege and the defendant denies that on March 1, 1929, when the sale of the cattle took place, the same was apparently in good physical condition and that the plaintiffs, who had no knowledge or experience in veterinary matters, were unable to discover at sight whether the said cattle were suffering from any hidden disease; that long before March 1, 1929, most of the cattle purchased from the defendant were affected by tuberculosis, which is a contagious disease, and that 43 head of cattle had died up to December 6, 1929, it being necessary to kill 29 additional head of cattle, which were also affected with tuberculosis, according to examinations practiced by the officials of the Department of Health; that the plaintiffs are willing to return all of the surviving cat-le and they pray the court that the contract entered into by the parties with regard to the sale of the cattle be declared null and void.

The defendant impeaches the last averments of the plaintiffs and alleges that the cattle sold had no vice or disease, occult or apparent; that the said cattle, on March 1 or on [fol. 20] the date of the sale and delivery thereof, was neither totally nor partially suffering from pulmonary tuberculosis or from any other contagious disease; denies the death of 43 head of cattle and also that 29 other head of cattle had to be killed, and alleges as new matter that the plaintiffs have been negligent in the care of the cattle; that when the cattle was sold the same were in perfect condition; and finally that the plaintiffs moved the said cattle to a piece of property near the Insular Sanatorium; that the same was not provided with stables or other structures adequate for a dairy farm, and that there was not sufficient grass nor the proper shade and water. As special defenses the defendant alleges that the complaint does not state facts sufficient to constitute a cause of action and that, even if it did, the cause of action would have prescribed in accordance with the provisions of Sections 1397 and 1399 of the Civil Code.

The trial of this case took several sessions of this court and in the course thereof the parties produced extensive

oral evidence. Part of this evidence consisted in the testimony of experts.

It is well to analyze, before going ahead, and in a summary manner, the evidence adduced herein. The evidence for the plaintiff reveals substantially that the purchase of the cattle was made on March 1, 1929, and that the cattle were taken away in two sections; that the cows had to walk 10 or 12 kilometers from the place where they were to the farm of the plaintiffs; that the cattle were to be used for dairy purposes; that on the date of the sale it was noticed that various cows were coughing, had diarrhea and the milk coagulated in the udder; that within three weeks the cattle began to die; that 72 died, of which number 29 were ordered to be killed by the sanitary authorities, some of them because they were affected by tuberculosis and others because they were suspected of having that disease; that the cattle began to die on the 18th of March; that in July, Varas a veterinary surgeon came to examine a dog and in passing also examined the cattle; that he performed an autopsy on one cow and found that it had tuberculosis; that then the plaintiffs went to see the defendant, explained the situation to him and he said that he did not have anything to do with it; [fol. 21] that the cows were purchased for the purposes of a dairy and Matos himself bought milk from the plaintiffs for some time after the sale.

The veterinary experts testified as to the condition in which they found the cows and as to the fact that they were suffering from pulmonary tuberculosis. The testimony of the experts is curious, for while some of them stated that the incubation period lasts months and even years, the more reliable consensus of opinion is that that period may last from two weeks to several months and that it is very difficult to determine whether the tubercular affection in the cattle is recent or old.

The parties also requested, and the court practiced, an ocular view of the properties where the cattle were and to which the same were taken by the purchasers, and in the record appear the minutes of this ocular view.

After the production of the evidence, the plaintiffs have filed a 30 page brief and the defendant a 105 page brief. Both briefs have been carefully read by the court.

There is no doubt that the animals which were the object of this suit died of a contagious disease, such as is pul-

monary tuberculosis. It is a settled fact that the appearance of the animal does not necessarily reveal its condition of health, in other words that a cow may be apparently sound and produce milk normally and nevertheless be suffering from tuberculosis; that to the cattle the object of this suit tuberculine was applied, and the result was a positive reaction in a certain number, which had to be killed; that the property to which the cows were taken was in fair hygienic condition and had sufficient water; that the autopsy practiced on some of the cows showed that a chronic cavernous condition existed which indicated that the cattle had been sick for a number of months; and finally that it is mighty difficult to state whether an animal apparently in good condition is suffering from tuberculosis or not.

The parties lay great stress upon the question of law involved and the court really believes that the determination of such question would settle this controversy, since the evidence supports the allegations of the complaint, namely that at the time of the transaction part of the cattle sold was suffering from a contagious disease. Said question [fol. 22] of law may be stated thus: Is the action exercised herein one of redhibition or one for nullity of contract?

The action is based on Section 1397 of the Civil Code, the two paragraphs of which read as follows:

"Animals and cattle suffering from contagious diseases shall not be the object of a contract of sale. Any contract made with regard to the same shall be void.

"A contract of sale of cattle and animals shall also be void when, the use or service for which they are acquired being stated, they are found to be useless therefor."

And commenting on this precept Manresa, in volume 10 of his Commentaries to the Spanish Civil Code, page 227, edition of 1905, says: "the question herein involved is not the liability incurred with a warranty, but the declaration of something unfit for a contract, based on strong reasons of public policy." In this regard it is convenient that we say something in reply to the theory of the defendant that inasmuch as all the cattle were not suffering from tuberculosis the contract should not be declared null and void. It is a principle of law that, in order that a contract exist, the three essential requisites of consent, object and consideration are necessary. Now, when a contract lacks any

of these essential requisites for its validity then the contract is null, that is it does not create the legal nexus established between the parties by the execution thereof, but there may be a case in which a contract with all these essential requisites for its validity, one of these requisites may be affected by a defect which invalidates the contract, and until the existence of such defect is shown the contract is valid and has to be considered as valid in law.

The question is plain to us. When the object of the contract is animals suffering from contagious diseases, the same is null. The precepts of the law are simple and there is no need of twisting it in order to find the hidden meaning it does not have. And the contract is null because it involves things that according to health and public hygiene are illicit articles of commerce. If a contract is entered into in these conditions, the object is lacking, and consequently there is no contract, inasmuch as one of its essential requisites is lack- [fol. 23] ing. The following question may then be made: If all the cows were not affected, is the sale null in so far as those that were sound are concerned? In order to answer the question it is necessary to determine why was the contract entered into, what were said cows to be used for. The evidence itself gives us the key, the cows were to be used for a dairy, that is for the business of milk production. This was the same business to which the defendant has been using them and it cannot be imagined that the plaintiffs paid the sum of money they paid for the 122 cows, if they were not going to use the cows in the same business. It is true that the complaint does not allege that it was part of the contract that the cows were to be used for a dairy. But this transaction was entered into verbally, and Alonso himself said in his testimony that the cows were purchased to be used for purposes of a dairy. If the cows were affected with tuberculosis, the Health Department acted according to law in closing the dairy and in preventing the sale of the milk, this being something which in our opinion should have been done many months before, in order to avoid the spread of such a terrible disease.

Now, the defendant insists that the action herein brought has prescribed inasmuch as the same has not been brought

Insert at bottom of Page 21 Transcript to substitute the words:— "In order to so decide the court holds that the action herein exercised is a redhibitory one", the words,— He bases his contention on the fact that the action herein exercised is a redhibitory one.

IN SUPREME COURT OF PUERTO RICO

No. 5793

ALONSO HERMANOS et al., Plaintiffs, Appellees,

v.

JOSE MATOS, Defendant, Appellant

Appeal from the District Court of San Juan

OPINION OF THE COURT

Delivered by Mr. Justice WOLF:

San Juan, Puerto Rico, April 6, 1934.

On the first of March, 1929, the parties in this case made an agreement whereby a sale of cattle was negotiated. The cattle were sold for the lump sum of $18,000. The purchaser, Alonso Hermanos, an agricultural partnership, paid $3,000 in cash to Jose Matos, the vendor, transferred to him a piece of property worth $5,000, and agreed to pay the balance in two years, to mature on the first of March, 1931. To secure the balance of the purchase price remaining unpaid, Alonso Hermanos executed a mortgage to Jose Matos, the deed for which was duly recorded.

[fol. 26] On December 12, 1929, the plaintiffs brought suit for the return of what they had paid and the extinction of their obligation to pay, alleging that the contract was null, void and inexistent, inasmuch as at the time of the supposed sale the herd of cattle was affected by consumption, occult and not apparent. The specific words of the complaint in this connection were:

"(d) That on the first of March, 1929, when the sale of the above mentioned cattle took place, the latter were apparently in good condition and that no notice was then given to the contrary by the defendant to the plaintiffs, who having no knowledge of or experience in veterinary matters, were unable to discover at sight whether said cattle were suffering from any hidden disease.

"(e) That long before the first of March, 1929, according to plaintiffs' information and belief, formed subsequently to said date, the herd of cattle sold by Jose Matos to Alonso Hermanos were suffering from tuberculosis, which is a con-

tagious disease, and that, on information and belief, from the 18th of March to December 6, 1929, out of the one hundred and twenty-two (122) head of cattle which constituted the aforesaid herd, forty-three have died of said disease, to wit:

* * * * * * *

"And, further, after tuberculine, which is a test to determine the presence of tuberculosis in cattle, was applied by an official of the Health Department of Puerto Rico, it was found that twenty-nine head more of the herd sold to Alonso Hermanos by Jose Matos were affected also by tuberculosis, contracted while the animals were in the possession of the defendant, according to plaintiffs' information and belief.

"(f) That the plaintiffs stand ready and willing to return to the defendant (and they hereby offer to do so) all of the surviving cattle which are a part of the entire herd sold to plaintiffs as above alleged on March 1, 1929, by Mr. Matos."

The defendant demurred, among other reasons, because the action had prescribed. The period of prescription on which the defendant relied is that specified in Section 1399 of the Civil Code (Comp. of 1911, Section 4505) as follows:

[fol. 27] "The redhibitory action, based on the vices or defects of animals, must be instituted within forty days, counted from their delivery to the vendee, unless, by reason of the customs in each locality, longer or shorter periods are established.

"This action in the sale of animals may only be enforced with regard to the vices and defects of the same, determined by law or by local customs."

The demurrer was overruled, and the defendant answered. He set up that at the time of the sale the cattle had no disease, occult or apparent. He denied that the forty-three cattle that were alleged to have died were affected by tuberculosis at the time of the sale, and alleged in effect that if they died it was by reason of the lack of care on the part of the plaintiffs and of the place or places where the latter had put the cattle.

The complaint did not set up a lack of good faith on the part of the defendant.

It may be said from a reading of the complaint and the brief of the appellees that the cause of action here is based exclusively on the idea that the sale was completely null and void and inexistent because a great part of the cattle was affected by tuberculosis at the time of the sale.

The plaintiffs insist that the action is based on Section 1397 of the Civil Code, which reads as follows:

"Animals and cattle suffering from contagious diseases shall not be the object of a contract of sale. Any contract made with regard to the same shall be void.

"A contract of sale of cattle and animals shall also be void when, the use or service for which they are acquired being stated, they are found to be useless therefor."

The court found that the sale took place on the first of March, 1929; that the cattle were taken away in two sections; that the cows had to walk ten or twelve kilometers to the farm of the plaintiffs; that the cattle were intended for dairy purposes; that on the day of the sale it was noticed that various cows were coughing, breathed with difficulty, had diarrhea, and the milk coagulated in the [fol. 28] udder; that within three weeks the cattle began to die, until 72 died, of which number 29 were ordered to be killed by the sanitary authorities, some of them because they were affected by tuberculosis and others because they were suspected of having that disease; that the cattle began to die on the eighteenth of March; that, in July, Varas, a veterinary surgeon, came to examine a dog and in passing also examined the cattle; that he performed an autopsy on one cow and found that it had tuberculosis; that then the plaintiffs went to see the defendant, explained the situation to him and he said that he did not have anything to do with it; that the cows, so the court found, were bought for the purposes of a dairy and Matos himself bought milk from the plaintiffs for some time after the sale.

With regard to the testimony of the experts the court said:

"The veterinary experts testified as to the condition in which they found the cows and as to the fact that they were suffering from pulmonary tuberculosis. The testimony of

the experts is curious, for while some of them stated that the incubation period lasts months and even years the more reliable consensus of opinion is that that period may last from two weeks to several months, and that it is very difficult to determine whether the tubercular affliction in the cattle is recent or not."

The court said, without specification of how many, that the animals the object of this suit died of a contagious disease such as is pulmonary tuberculosis; that it was a settled fact that the appearance of the animal does not necessarily reveal its condition of health; in other words, that a cow could be apparently sound and produce milk normally and nevertheless be tuberculous; that to the cattle the object of this suit tuberculine was applied, and the result was a positive reaction in a certain number, which had to be killed; that the property to which the cows were taken was in fair hygienic condition and had sufficient water; that the autopsy made on some of the cows showed that a chronic cavernous condition existed, which indicated that the cattle had been sick for a long time.

Then the court places the issues in this case as follows:

"The parties lay great stress upon the question of law [fol. 29] involved, and the court really believes that the determination of such question would settle this controversy since the evidence supports the allegations of the complaint, namely, that at the time of the transaction part of the cattle sold was suffering from a contagious disease. Said question of law may be stated thus: Is the action exercised herein one of redhibition or one for nullity of contract?"

The court proceeds to discuss the issues and among other things decides that the contract was null, void and inexistent; that the parties knew that the cattle were to be used in a dairy; that is to say, the court was of the opinion that the sale should be considered as an entirety, inasmuch as the cows were to be used for a dairy, and this fact was known to the defendant. The court therefore held that the sale was void as an entirety. The use to which the cattle was to be put was not alleged in the complaint to have been specified in the contract, the condition set out in the second paragraph of Section 1397.

The court thought that the prescriptive period of forty days was not necessarily to be applied in Puerto Rico and that in any event the contract was entirely void because it lacked an adequate consideration. The court based its decision on Section 1397, supra.

For convenience, we shall first discuss the final issues in the case, disregarding, for the moment, the demurrer.

Section 1397 of the Civil Code, on which the plaintiffs rely, is placed in a chapter the title of which is as follows:

"Warranty against defects of or burdens on the thing sold."

A better translation of the Spanish would be:

"Warranty against hidden defects or encumbrances of the thing sold."

The appellant argues that the title shows that all sections within it refer to warranties, that an action for a breach of warranty in cases of animals must be exercised within forty days, as provided in Section 1399, supra; and that the action herein exercised is one of redhibition.

On the contrary, the appellees maintain that Section 1397 [fol. 30] of the Civil Code is absolute in its terms and that the accident of its being placed under a chapter entitled as we have seen could not affect such an absolute situation; that the theory of the said section, as explained by the commentators, is to make a contract totally inexistent, prescription not being, therefore, applicable.

Section 1397, supra, says that animals suffering from contagious diseases shall not be the object of a contract of sale. This is the written law in Puerto Rico and it was equally the law of Spain. Section 1494 of the Spanish Civil Code is exactly the same as ours. There is no doubt that tuberculosis would be one of the contagious diseases referred to in Section 1397.

Tuberculosis in cattle may be communicated to human beings through the milk and by other means unnecessary to enumerate. The disease is similar in its effects to tuberculosis in man but the contagion that is transmitted by cattle to human beings does not exhaust the realm of tuberculosis that may be contracted. The evidence of the experts in this case tended to show that a cow may be affected by tuberculosis and continue to yield good milk; that it is only after

the disease reaches a certain stage that the milk itself is a bearer of disease.

In 1902 the Civil Code of Puerto Rico was adopted. The mind of the Legislature was not specifically fixed on the disease of bovine tuberculosis. If we investigate the history of the legislation in regard to the vices for which the vendor gave a warranty, we shall find that universally vices in animals giving the purchaser a cause of action were characterized as redhibitory. This was true from the time of Ediles in Rome. The Latin word redhibitio means a return of the thing sold, or sometimes of part of the thing sold, with a right to obtain all or a part of the price paid. A vice in an animal causing the annulment or the rescission of the sale has always been considered as redhibitory, at least up to the enactment of the Civil Code of Spain of 1889, and hence of that of Puerto Rico. It may be noted that in the proposed bill (proyecto) of 1851 there were certain redhibitory vices pointed out, and tuberculosis in cattle was one of them. The French legislation follows the same course.

Louisiana has written a definition into its code as follows:

[fol. 31] "Redhibition is the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice."

C. C. Art. 2520. (Henderson v. Leona Rice Milling Co., 160 La. 597, 107 So. 459.)

The plaintiffs themselves in bringing this action offered to return all the cows that remained in their possession, because in their opinion the whole contract was null, void and inexistent by reason of the presence of tuberculosis and of the fact that the cows were intended for a dairy. In other words, the learned counsel for the appellees realized that in order to have a possibility of success in their suit they were bound to return or offer to return the animals, the subject of the contract, whether diseased or not. Whatever else it may be characterized or whatever else may be the effect of Section 1397, the action for the nullity mentioned therein is necessarily a redhibitory action. If the vendor refuses to return the price and receive back the ani-

mals, the purchaser has to bring an action, and that action is a redhibitory one, whether the thing attempted to be sold can or can not be the subject of a contract by reason of Section 1397. The idea of the plaintiffs here was that, as a great part of the animals were diseased, the whole contract was void.

Some of the commentators on the Civil Code apparently say, especially when discussing the question of prescription, that Section 1397 makes the contract absolutely inexistent, implying, therefore, that no prescription runs. 10 Manresa (4th ed.) 229; 24 Laurent 109; 1 Gasca, infra. Other commentators do not agree with this interpretation. The most poignant commentary is made by Scaevola at page 668 of volume 28 of his Commentaries on the Civil Code, as follows:

"We repeat that no contract can be annulled by reason of redhibitory defects, and even less because of those mentioned in article 1494 than by reason of those set out in article 1484. We add that if article 1484 in fact attempted [fol. 32] to establish the nullity, it is in open conflict with article 1494 and with those which regulate the consent in general.

"We prefer, therefore, to think that 'Homer slept'; that nothing else was intended than to apply specifically to the sale of animals or cattle what was already provided for all kinds of alienations in general; that, in so doing an uncalled for repetition was incurred; and that, as it generally happens in such cases, in saying what was not needed it was ended by saying what should not have been said. Let it be understood, then, that when the contract we are discussing is declared to be void it has been intended to characterize it as 'voidable' (*rescindible*) subject to a redhibitory action as in the case of any other contract where the thing sold lacks fitness."

Let us take an example particularly germane to this case. A sale of a cow is made and both parties are acting in good faith. Nevertheless, after a while, either by his own observations or the intervention of the health authorities the buyer learns that the cow has incipient tuberculosis. However, the cow is exceptionally good and the purchaser desires to retain it. Under all the authorities he could not retain the cow and get back the price. To recover the price

he must return the animal. It is entirely at his election to retain the cow.

No different rule could apply where cattle are sold in bulk. Both parties have entered into a discussion as to whether the sale in bulk (precio alzado) could affect the questions before us. The appellees maintain that as a great part of the cattle was affected, the whole sale was void or voidable. The appellant insists that Section 1397 only applies at best to the cattle actually diseased, and that each animal must be considered separately.

In Louisiana it has been said that a warranty is of the nature of the contract of sale; that is, the law implies it, if a contrary agreement be not made; but that it is not essential to such a contract; that the vendor may stipulate he will not warrant at all, or he may covenant that his warranty shall be restricted, or he may contract that his vendee shall accept the warranty of a third person. Strawbridge [fol. 33] v. Warfield, 4 La. 20. A similar ruling was made in Bayon v. Vavasseur, 10 Mart. (O. S.) 61, 66.

This brings us to another point. The appellees attempt to say that Section 1397 stands for itself and that it makes the contract absolutely non-existent. Nevertheless, the said section is contained in a chapter which speaks of warranty for the hidden defects or encumbrances of the thing sold.

We, therefore, come to the conclusion with Scaevola that necessarily the legislator meant to say that the contract could be rescinded or annulled as in other redhibitory actions, and that Section 1397 does not exclude the transaction made in this case from the field of warranties.

Likewise, the parties by stipulation may make redhibitory those defects which are not so ordinarily. This has some tendency to show that the word "redhibitory" has a recognized standing or position in the law. It is another straw involving the idea that an action which involves the return of defective property should be considered as redhibitory.

The nature of a redhibitory action is shown in Childs v. Wilson, 15 La. Ann. 512, where the court said:

"The plaintiff does not sue to avoid the sale, and recover back the notes given for the price; in other words, this is not a redhibitory action; but he sues for the price, without seeking to disturb or annul the contract of sale, under

which the horse and mule came into his possession, and under which he executed and delivered his notes to the defendant. This the plaintiff can not do; before he can recover the price, or the notes given for the price, he must sue for and obtain, in the form prescribed by law, the avoidance of the sale."

It is presupposed always that the animal subject to redhibition should be returned if a return can be made. While in the present case there are fifty cows left, and the evidence tended to show that they were sound, the plaintiffs acted on the theory that they were returnable because the herd was bought for a dairy, and attempted to return them. Thus the action they attempted to set up was necessarily redhibitory.

[fol. 34] Falcon in volume 4, page 230, of his work on the Civil Code, says, with respect to redhibition, as follows:

"As the hidden defects which give rise to the warranty have always been called redhibitory vices, the warranty obtaining in such cases is similarly named, and likewise the action available to the vendee. The effect of redhibition is that the vendee may elect to rescind the contract or demand a proportional reduction of the price. If he elects the former, the vendee and the vendor must restore to each other, respectively, the thing sold and the price, and in addition thereto, the expenses which the purchaser may have incurred must be reimbursed to him. If he elects the latter remedy, in the absence of a contrary stipulation, experts appointed by both parties will determine the amount of the depreciation occurred in the thing sold by reason of the hidden defects or encumbrances discovered therein.

* * * * * * *

"When the thing sold is lost on account of the hidden defects, the loss falls on the vendor, who must return the price, and pay the expenses incurred, with damages, if he acted in bad faith.

* * * * * * *

"The sale of animals is subject to most special rules by reason of the frequency of hidden defects and the greater ease with which they can be concealed. Because of this the rules enacted by the codes are quite special. Some of

the codes specify the hidden vices or diseases which are designated as redhibitory and thus give rise to a warranty. Accordingly, they group cattle in various classes. It was so proposed in our project for the Code of 1851, and accomplished by the Austrian and Bavarian codes. The majority merely set forth the general rule, which in the case of some, such as the French Code, has been supplemented by special legislation. This is the system adopted by our own code, and article 1496 thereof had a future law in contemplation when it referred to vices or defects specified by law.

"Where several animals are sold together and redhibi- [fol. 35] tory vices are discovered in some of them, the warranty operates only as to the latter; but this rule does not apply where it clearly appears that the vendee would not have purchased all of the animals had he known that some were defective—as in the case of teams of horses or of mules, yoke of oxen, and other animals dealt in pairs.

"In sales of cattle made at fairs or at public markets the warranty against hidden vices does not obtain, except when the animals are suffering from contagious diseases, or when the service for which the animals are intended having been stated in the contract, they are found later to be useless therefor."

In his commentaries on the Spanish Civil Code, volume 4, page 507, Don Leon Bonel y Sanchez, referring to Section 1494 of the Spanish Code (equal to Section 1397 of our code) points out that pulmonary consumption is considered as a redhibitory vice in cattle.

In the notes to the French codes edited in 1861, the first redhibitory defect in cattle mentioned is pulmonary tuberculosis.

In the second volume, page 13, of his work "De la Vente", Troplong says: "If the animal is affected with a contagious malady, redhibition takes place." And again: "Outside of contagion, which is a redhibitory vice for all (animals) * * *", and then the author proceeds to specify other diseases that may be considered redhibitory.

Martinez Ruiz says at page 362 of volume 9 of his commentaries on the Civil Code:

"In all of the articles considered in this commentary mention is made of redhibition, that is, of the vendee's

right to rescind the contract. This is not, however, the only right given to him to compensate whatever damages the vices or defects of the animals sold may have caused him. Article 1499 makes extensive to sales of cattle and other animals the provisions of article 1486, under which the vendee may elect—without anything to limit this right of election—to withdraw from the contract, the expenses which he may have incurred being returned to him, or be reimbursed a proportional part of the price, according to the judgment of experts.

[fol. 36] "The time within which any of these actions—whether for rescission of the sale, or a diminution of the price—must be exercised is not the one provided in article 1490, but that established by the customs of the locality or, in the absence of these, that fixed by article 1496—forty days."

In volume XXVI, page 884, of the Enciclopedia Juridica Espanola, a redhibitory action is defined as follows:

"An action of the Roman Law available to the vendee in a contract of sale.

"According to a special provision of the aedelician edict, the vendor was responsible for all hidden defects (*morti vitra*) which the thing sold had at the time of the contract, even though they were unknown to him and he was likewise responsible for all the stipulated qualities which the thing should have or should not have (*dicta promissa*). So that when the thing sold had hidden defects or when the *dicta* and *promissa* qualities were not established, the vendee might always elect either to demand the rescission of the contract or a diminution of the price, both where the defects were capital as well as where they were secondary.

"In the former case the action exercised was the '*actio redhibitoria*' which prescribed in six months when the vendor had given bond for the defects of the thing sold and in two months when it was otherwise. The redhibitory action could be resorted to only once. * * *

"Our private law has substantially adopted the redhibitory action when authorizing the rescission of contracts of sale by reason of defects in the thing sold, under the general Civil Law as well as under the special Commercial Law, and it distinguishes between defects easily detected

upon examination by the vendee and hidden defects when fixing the period of time available for the rescission."

We have also before us a work on sales by the Italian commentator Gasca, translated into Spanish. Commenting on similar provisions of the Italian code, he says:

[fol. 37] "The sale is void when the subject-matter thereof, which coincides with its object, is contrary to law or public order. (Article 1122 of the Civil Code.)

"It is void because, the things alienated being outside the commerce of man, the vendor would act fraudulently in selling them; also because the sale can not be valid when it constitutes a crime or a violation of law.

"In my opinion the judgments which regard the infectious or contagious disease of an animal as a redhibitory vice are defective and wrong. Undoubtedly the absolute nullity of the contract of sale in such cases should not be declared except after it has been proved that the germ of the disease antedated the contract, since the animal could have contracted the disease after the sale. But once such proof is established, whether the vendor acted in good or bad faith, the sale should not be avoided only by reason of the exercise of the redhibitory action, but it should be adjudged null and void for lack of the thing which according to law may be the object of the sale." (Page 357.)

And possibly more to the same effect. The author, however, cites three decisions of courts of cassation of Italy which do not agree with him. And he himself does not give the reasons for his conclusion.

For our purposes it would be well to transcribe the whole chapter on warranty for hidden defects:

"Sec. 1387. The vendor is bound to give a warranty against hidden defects which the thing sold may have should they render it unfit for the use to which it was destined, or if they should diminish said use in such manner that had the vendee had knowledge thereof he would not have acquired it or would have given a lower price for it; but said vendor shall not be liable for the patent defects or those which may be visible, neither for those which are not visible if the vendee should be an expert and who by reason of his trade or profession should easily perceive them.

"Sec. 1388. The vendor is liable to the vendee for the warranty against faults or hidden defects in the things sold, even when they should be unknown to him.

[fol. 38] "This provision shall not obtain if the contrary should have been stipulated and the vendor should not have been aware of said faults or hidden defects.

"Sec. 1389. In the cases of the two preceding sections the vendee may choose between withdrawing from the contract, the expenses which he may have incurred being returned to him, or demanding a proportional reduction of the price, according to the judgment of experts.

"If the vendor knew of the faults or hidden defects in the thing sold and did not give notice thereof to the vendee, the latter shall have the same option, and furthermore, be indemnified for the losses and damages should he choose the rescission.

"Sec. 1390. If the thing sold should be lost on account of hidden faults and the vendor was aware of them, he shall bear the loss, and return the price and pay the expenses of the contract, with losses and damages. If he was not aware thereof, he shall only return the price and pay the expenses of the contract which the vendee may have paid.

"Sec. 1391. If the thing sold had any hidden fault at the time of the sale, and should be lost afterwards by a fortuitous event or by fault of the vendee, the latter may demand of the vendor the price he paid, deducting the value the thing had when lost.

"If the vendor acted in bad faith, he must pay losses and damages to the vendee.

"Sec. 1392. There shall be no liability for losses and damages in judicial sales, but all the other provisions of the preceding section shall be applied.

"Sec. 1393. Actions arising from the provisions of the five preceding sections shall be extinguished after six months, counted from the delivery of the thing sold.

"Sec. 1394. If two or more animals should be sold together, whether it be for a lump sum or for a special price for each of them, the redhibitory vice of each one shall only cause the redhibition of the same and not that of the [fol. 39] others, unless it appears that the vendee would

not have purchased the sound one or ones without the defective animal.

"This is presumed when a team, yoke, pair, or set is bought, even when a special price has been fixed for each one of the animals composing the same.

"Sec. 1395. The provisions of the preceding section, with regard to the sale of animals, is understood as applicable also to the sale of other things.

"Sec. 1396. Warranty for the hidden vices of animals and cattle shall not obtain in sales made at fairs or at public auctions, nor in the sale of riding beasts, sold as condemned, except in the case prescribed in the following section.

"Sec. 1397. Animals and cattle suffering from contagious diseases shall not be the object of a contract of sale. Any contract made with regard to the same shall be void.

"A contract of sale of cattle and animals shall also be void, when the use or service for which they are acquired being stated, they are found to be useless therefor.

"Sec. 1398. If the hidden vice of animals, even if a professional inspection has been made, should be of such a nature that the knowledge of experts is not sufficient to discover it, it shall be considered as redhibitory.

"But if the veterinarian, through ignorance or bad faith, should fail to discover or to give notice of it, he shall be liable for losses and damages.

"Sec. 1399. The redhibitory action, based on the vices or defects of animals, must be instituted within forty days, counted from their delivery to the vendee, unless, by reason of the customs in each locality, longer or shorter periods are established.

"This action in the sale of animals may only be enforced with regard to the vices and defects of the same, determined by law or by local customs.

"Sec. 1400. If the animal should die within three days after being bought the vendor shall be liable, provided the disease that caused the death, in the judgment of veterinarians, existed before the contract.

[fol. 40] "Sec. 1401. If the sale has been rescinded the animal must be returned in the condition in which it was

sold and delivered, the vendee being liable for any injury due to his negligence and which does not arise from the redhibitory vice or defect.

"Sec. 1402. In the sale of animals and cattle with redhibitory vices the vendee shall enjoy the privilege mentioned in section 1389; but he must make use thereof within the same period which has been respectively fixed for the exercise of the redhibitory action."

As will be seen, section 1393 fixes a period of six months for the prescription of ordinary warranties. Section 1399, however, requires that a redhibitory action for vices or defects in animals should be brought within forty days. This is a universal provision which necessarily applies to redhibitory vices, whether in the nature of a contagious disease or not.

It is almost unimaginable that the purchaser of a cow should have the right to rescind or annul the sale for one, two, three or more years after taking possession of the animal. It is inconceivable that a man might milk the cow for two or three years, be perfectly satisfied with it, and then return it because it had tuberculosis. Scaevola says that he can not conceive that by reason of a contagious disease the limitation should be changed from forty days to four years. 23 Scaevola, page 666. In other words, he had the idea that even for contagious diseases prescription should run, that is to say, that at some time the action would prescribe. It may not be held, as maintained by the appellees, that there was never any period of prescription in the case. If the action could prescribe in four years, there is no reason why the Legislature should not fix forty days in cases of contagious diseases. This for us is the principal point in the case.

What the legislature in Spain had in mind probably was that a contagious disease would manifest itself within forty days. No particular attention was given to the thought that a longer time might perhaps be necessary where tuberculosis was concerned. In any event the statute fixed forty days unless the local usages required a different period. Ad ea quae frequentious accidunt jura adaptantur. So [fol. 41] much was this so that at the time of the preparation of the proposed bill of 1851 the veterinary experts thought that fifteen days was a reasonable time within

which to bring a redhibitory action on account of bovine tuberculosis.

Referring to the defective legislation we are now considering, Scaevola says:

"This subject of the sale of animals has been brought into the Code in fragments, which form a veritable juridical crazy-quilt, made up of all sorts of materials and hues. The contrast exhibited by the provisions as against each other is as striking as it is queer; the deficiencies noted are as numerous as they are regrettable; and were it not for the fact that, in reality, notwithstanding their divers origin and the independence with which they clothe themselves, they all respond essentially to very well known and old principles which are identified through them, it would be practically impossible at times to ascertain the intention of the legislator.

"The two articles which we have before us (corresponding to articles 1396 and 1397 of the Civil Code of Puerto Rico) are good proof of these conclusions, for, looking at their phraseology only, they appear to seek entirely different purposes, whereas essentially they are perfectly consistent. As regards the legal terms they use and the accuracy of their provisions, they are likewise objectionable. Thanks to the good fortune that these articles apply to causes, which are generally of small import and can be determined in oral trials ('juicio verbal'), the consequences will not be very serious. Otherwise, both these articles and all which follow in the same section would render themselves famous in the annals of Judicial administration." (Id. page 655.)

This crazy-quilt (edredon), as Scaevola characterized it, has impelled us to make a wider examination of the authorities than is ordinarily necessary.

Up to 1889, when the Spanish Civil Code was passed, it may be noted that the time in which a redhibitory action [fol. 42] should be brought was a limited one: from time immemorial a period of not more than six months. If by Section 1397, to take the extreme case, the legislator thought that the existence of a contagious disease would render a contract for the sale of cattle non-existent, did the legislator show any intention of preventing such an action from ever prescribing? As some of the commenta-

tors say, it seems inconceivable that the intention was to prevent such an action from prescribing or relegate the prescription to the term of four years determined by the chapter on the nullity of actions, or to the period of fifteen years provided in the code for the limitation of actions when no term is otherwise provided.

As the prescription of forty days was first introduced into the code along with the reformed precept of Section 1397 (1494 of the Spanish code) the strong probability is that the legislator thought that a shorter period than formerly was advisable. We have elsewhere made the comment that the Spanish legislator probably did not have tuberculosis in mind. The only way to harmonize the whole matter is to conclude that the legislature continued to think that the obligation incurred by a vendor of cattle with a contagious disease was responsive to a redhibitory claim that the purchaser had, and the legislature also had in mind that the period of prescription for all redhibitory actions, including those involving animals affected with contagious diseases, should be short. For other occult vices in sale of property the prescriptive period of six months prevails. The way to harmonize the whole chapter is to declare that the legislature was fixing different periods of prescription for every occult vice enumerated therein; in other words, a period of six months for ordinary vices and a period of forty days when animals were involved. It may even be that the legislature had in mind contagious diseases in animals when it fixed the prescription of forty days, inasmuch as most diseases of that nature would come to light before that time.

The introduction in 1889 of a period of prescription of forty days and the enactment of Section 1397 at the same time would be a strange coincidence, if they had no relation to each other.

We shall not give a great amount of attention to the [fol. 43] contention that the complaint failed to state a cause of action. What the appellant apparently maintains is that, as a part of the cattle, some fifty or more in number was not shown to be diseased, the theory of the action could not prevail or at least could not prevail for the cattle not shown to be unsound.

We think that the demurrer lay. If the court below and the appellees were right that the whole sale as an entirety

was annullable because of contagious diseases in a majority of the animals, then, of course, the complaint was good. We have the idea that when cattle are sold, even for a dairy, the animals are sold individually. It is a distributive sale. It makes no difference that the sale was for a lump sum. With the exceptions noted in the chapter, only the cattle affected with a redhibitory vice, under all the codes and the commentators that we have seen, may be returned.

Our notion of a dairy is that cattle are continually being bought and sold for its purposes, and the complaint does not allege that the business of a dairy could not commence or proceed by reason of occult vices in the animals or that if animals died they could not be replaced. As we see it, as soon as one cow died another could be purchased or the business go on without any new acquisition. Furthermore, the complaint does not distinctly set forth that the cattle were to be used for a dairy. Besides, whenever cows are bought in bulk in the majority of cases they are bought for a dairy or for similar purposes.

Likewise we thing that, given the attitude of the appellees in basing their action exclusively on Section 1397 of the Civil Code, the motion to strike presented by the defendant ought to have prevailed in certain particulars. For example, all matters which related to the knowledge or lack of knowledge of the plaintiffs when purchasing the cows. That knowledge was totally unimportant under Section 1397. On the other hand, the appellant also moved to strike from the complaint what was said with regard to an offer by the plaintiffs to return the remaining cows. The averment was important, it seems to us, for the proper purposes of the defendant in attempting to show that the action was redhibitory and had prescribed.

[fol. 44] In view of the fact that the judgment must be reversed in any event, we shall give no further attention to the motion to strike.

For similar reasons, although the complaint might be considered unintelligible and ambiguous in certain respects, we shall not discuss the matter.

Coming then to the trial of the case, our final conclusion is that from the evidence the court had a right to find that a great number of the cows sold were affected by tuberculosis at the time of the sale. Independently of the state-

ments of the witnesses or of the principal witness, Alonso, the preponderance of the evidence satisfies us that the disease was not contracted after the sale, at least with respect to a number of the cows. Existing, as it did, in some cases in advanced form the court had a right to decide the facts as it did.

We shall not give great heed to the moral questions involved. Presuming, as we must, the good faith of both parties, the position of either of them was hard. If, for example, some of the cattle had tuberculosis which would make no progress, technically the purchaser had a right to rescind the sale within forty days. For him, however, it would be exceedingly hard that the cattle should die on his hands after two or three months of use on account of tuberculosis. Similarly would be the position of the defendant.

In short, our examination of the statutes and the jurisprudence convinces us that the action brought in this case could only be good if brought in time, to recover for the animals actually affected by tuberculosis. The defendant had a clear right to insist that the contract was good for the cattle that were sound. This brings us to another doubt. If part of the cattle was in good health and hence there was some consideration for the contract, it might be maintained that the contract existed and that the plaintiffs were only entitled to sue for a partial failure of consideration.

Let us suppose the payment of price for certain lands. It turns out that the vendor did not have title to one of the pieces. We think it is evident that the whole contract frequently, if not ordinarily, could not be rescinded or annulled.

Before concluding this opinion we desire to say, and this appears possibly from our general considerations, that [fol. 45] the plaintiffs never had the right to the cancellation of the whole contract, but only to bring a redhibitory action for the animals that were suffering from or died of a contagious disease.

Principally because the cause of action prescribed, and perhaps for other reasons, the judgment should be reversed and the complaint dismissed.

Adolph G. Wolf, Associate Justice.

In Supreme Court of Puerto Rico

[Title omitted]

Judgment—April 6, 1934

For the reasons stated in the foregoing opinion, the judgment appealed from rendered by the District Court of San Juan in the above-entitled case on January 12, 1931, is hereby reversed and the complaint dismissed.

It was so decreed and ordered by the court as witness the signature of the Chief Justice.

Emilio del Toro, Chief Justice.

Attest: Joaquin Lopez, Secretary-Reporter.

[Memorandum. Petition for appeal; order allowing appeal; bond on appeal in the sum of $300 and supersedeas bond in the sum of $7,000, Leopoldo Diaz and Epifanio Fernandez Campos, sureties; orders of court approving bonds and citation are here omitted. A I. Charron, Clerk.]

In Supreme Court of Puerto Rico

[Title omitted]

Assignment of Errors

And now, on this ninth day of July, A. D. 1934, came the above-named appellants, by their attorney, Martin Travieso, and say that the judgment made and entered by the Honorable Supreme Court of Puerto Rico in the above cause, on the sixth day of April, 1934, is erroneous for the following reasons:

1. The Supreme Court of Puerto Rico erred in not hold-
[fol. 46] ing, as a matter of law, that the contract between the plaintiffs, appellants and the defendant, appellee, for the purchase and sale of a herd of 122 head of cattle, shown to have been affected at the time of the sale with tuberculosis, a contagious disease, was null, void and nonexistent

and contrary to public policy, in accordance with the provisions of Article 1398 of the Civil Code of Puerto Rico.

2. The said court committed error when it held that the action brought by the plaintiffs, appellants against the defendant, appellee was an action for the rescission of a valid contract for the purchase of cattle, and it further erred when it held that said action was based upon the discovery by the purchaser of secret vices or defects in the animals purchased.

3. The said court committed error when it held that the plaintiffs, appellants had no right to demand that the whole contract of March 1, 1929, be declared to be null, void and non-existent and contrary to public policy, for the reason that the herd of cattle bought from defendant, appellee was affected with tuberculosis, and could not be made the object of a legal sale; and, further, the said court committed error when it held that the only remedy open to plaintiffs, appellants was to demand the rescission of the sale as to specific heads of said herd of cattle which had been found affected with tuberculosis.

4. The said court committed error in holding that tuberculosis, which is a contagious disease, should be considered as a hidden or secret vice or defect in the animals sold, and in holding, as a natural consequence of the aforesaid error, that plaintiffs, appellants' action for the rescission of the contract of sale should have been brought within the period of 40 days counted from the date of the delivery of the cattle to the purchaser, as provided by Article 1399 of the Civil Code of Puerto Rico. (Comp. of 1911, Section 4505.)

5. The said court committed error in not holding that plaintiffs, appellants, as purchasers of an entire herd of 122 head of cattle, had a right to reject and repudiate the whole sale, as an entirety and as null and void, upon discovery that a large number of the head of cattle composing the said herd were affected with tuberculosis, a contagious disease.

6. The court committed error in reversing the judgment [fol. 47] of the trial court in favor of the plaintiffs, appellants and in dismissing the complaint upon the erroneous ground that the right of action of said plaintiffs, appellants

was barred by the lapse of the 40 day period provided by said Article 1399 of the Civil Code of Puerto Rico.

7. The court erred in not holding that the action herein had been interposed by plaintiffs, appellants within the period of limitation provided for such action by the laws of Puerto Rico and by the principles of equity and justice.

8. The judgment of the Supreme Court of Puerto Rico is erroneous and contrary to law and equity and not justified by the undisputed facts and circumstances of the case.

Wherefore the appellants pray that the judgment of the Supreme Court of Puerto Rico be reversed and that final judgment be rendered by the Honorable United States Circuit Court of Appeals in accordance with the terms of the judgment rendered by the trial court in favor of the plaintiffs, appellants.

San Juan, Puerto Rico, July 9, 1934.

Martin Travieso, Attorney for Appellants.

Translator's certificate omitted in printing.

[fol. 48] IN SUPREME COURT OF PUERTO RICO

[Title omitted]

SECRETARY-REPORTER'S CERTIFICATE

I, Joaquin Lopez, Secretary-Reporter of the Supreme Court of Puerto Rico, do hereby certify:

That the foregoing is the transcript of record prepared by the plaintiffs and appellants, which transcript I attach to this certificate as the record in the above-entitled case, at the request of the parties herein, as appears from the following stipulation concerning the record on appeal filed by the attorneys for plaintiffs, appellants and for defendant, appellee in the case at bar on April 2, 1935:

"Stipulation. It is hereby stipulated and agreed by and between the undersigned, attorneys for the appellants and appellee, respectively, that the foregoing is a true and exact

copy and translation into the English language of the original documents constituting the record of the above-entitled case in the Supreme Court of Puerto Rico; and that the same is hereby accepted and approved by both parties as the Record on Appeal to be submitted to the Circuit Court of Appeals for the First Circuit.

San Juan, Puerto Rico, April 2, 1935.

Martin Travieso, Attorney for Defendants-Appellants. Heriberto Torres Sola, Attorney for Plaintiff-Appellee."

In witness whereof I sign these presents in the City of San Juan, Puerto Rico, after having duly cancelled the sum of one dollar ($1.00) in Internal Revenue stamps, this fourth day of April, A. D. 1935.

Joaquin Lopez, Secretary-Reporter of the Supreme Court of Puerto Rico. (Seal.)

[MEMORANDUM. Orders of enlargement of time for docketing case to and including April 16, 1935, are here omitted. A. I. Charron, Clerk.]

[fol. 49] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1934

No. 3029

ALONSO HERMANOS et al., Plaintiffs, Appellants,

v.

JOSE MATOS, Defendant, Appellee

STATEMENT OF ERRORS, ETC.—Filed April 18, 1935

To Arthur I. Charron, Esq., Clerk of the above Court:

Now come the above-named appellants, by their undersigned attorney, and in accordance with the provisions of Rule 23, paragraph 8, of the Rules of this Honorable Court, respectfully submit herewith the following statement of the errors on which the appellants intend to rely and also

a statement of the parts of the transcript of record which the appellants think necessary for the consideration of the said errors:

Errors on Which Appellants Will Rely

The appellants will rely upon the first seven errors appearing in the "Assignment of Errors" filed by them with their petition for appeal, on July 9, 1934.

Parts of the Transcript of Record Necessary for Consideration of Errors Assigned

1. Verified complaint.
2. Motion to strike out.
3. Demurrers.
4. Order of February 3, 1930.
5. Verified answer to complaint.

[fol. 50] 6. Ocular view of premises.

7. Statement of facts, opinion and judgment of District Court.
8. Opinion of the Supreme Court.
9. Judgment of the Supreme Court.
10. Assignment of errors.
11. Translator's certificate.
12. Clerk's certificate.

Wherefore, appellants respectfully pray that only the aforesaid parts of the transcript of record be printed.

New York, April 17, 1935.

Martin Travieso, Attorney for Appellants, San Juan, Puerto Rico.

New York Address: c/o Arthur F. Gotthold, Esq., 53 William Street, New York City.

Certificate of Service.

I hereby certify that on this seventeenth day of April, 1935, I served a copy of the foregoing paper on Heriberto Torres Sola, Esq., attorney for the appellee in this case, by depositing the said copy in a sealed envelope addressed to the said attorney to his address "Edificio Bouret, San

Juan, Puerto Rico". Said sealed envelope was sent to said attorney, postage prepaid, by airmail.

New York, April 17, 1935.

Martin Travieso, Attorney for Appellants.

In United States Circuit Court of Appeals

[Title omitted]

Counter Statement—Filed April 24, 1935

Now comes the above-named appellee by his undersigned attorney, and respectfully represents as follows:

1. That the appellants in this case have filed with the clerk of this Honorable Court a motion dated April 17, 1935, praying that only certain part of the record in the above-entitled case, to wit the following documents:

[fol. 51] 1. Verified complaint,
2. Motion to strike out,
3. Demurrers,
4. Order of February 3, 1930,
5. Verified answer to complaint,
6. Ocular view of premises,
7. Statement of facts, opinion and judgment of District Court,
8. Opinion of the Supreme Court,
9. Judgment of the Supreme Court.
10. Assignment of errors,
11. Translator's certificate,
12. Clerk's certificate,

be printed.

2. That there has been no stipulation between the parties herein providing for the printing of only a part of the record in accordance with the subdivision of Rule 23 of this aforesaid Honorable Court.

3. That in order that this Honorable Court may be placed in the same position in which the Supreme Court of Puerto Rico was when deciding this case and in order that in his brief this appellee can make proper references to the part

of the record upon which he will make arguments in support of an affirmation of the judgment, appellee from this case, it is necessary that the extra record certified as basis for this appeal be printed.

4. That the appellants in this case have filed an assignment of errors specifying eight errors, and although it is stated in the aforesaid motion that appellant will rely only upon the first seven errors thus specified, this appellee considers that for the proper consideration of said seven errors on which the appellants intend to rely, it is necessary that the record be printed in full, especially as the appellants have asked for the inclusion among the documents by them designated for printing, as expressed, one entitled "Ocular View of Premises", number 6 on the aforesaid list, which is a part of the evidence and which if considered by itself, and disconnected from the rest of the evidence introduced at the trial, would tend to affect prejudicially the rights of appellee, who would then have no opportunity for arguing on the evidence thus eliminated from the record.

[fol. 52] Wherefore, the appellee respectfully prays that the aforesaid motion of the appellants be denied, and that said appellants be ordered to print the entire record in accordance with the rules of this Honorable Court.

San Juan, Puerto Rico, April 22, A. D. 1935.

Heriberto Torres Sola, Attorney for Appellee, San Juan, P. R., Address: Bouret Building, Box 905, San Juan, P. R.

Certificate of Service

I hereby certify that on this twenty-second day of April, 1935, I served a copy of the foregoing paper on Martin Travieso, Esq., attorney for the appellants in this case, by depositing the said copy in a sealed envelope addressed to the said attorney, to his address in New York, c/o Arthur F. Gotthold, Esq., 52 William Street, New York City, N. Y. Said sealed envelope was sent to the said attorney, postage prepaid, by airmail.

San Juan, Puerto Rico, April 22, 1935.

Heriberto Torres Sola, Attorney for Appellee.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER AS TO PRINTING RECORD—April 24, 1935

It is ordered that the clerk print only such portions of the transcript of record as are designated in appellants' statement of the parts of the record to be printed.

By the Court.

Arthur I. Charron, Clerk.

[fol. 53] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1935

No. 3029

ALONSO HERMANOS et al., Plaintiffs, Appellants,

v.

JOSE MATOS, Defendant, Appellee

Appeal from the Supreme Court of Puerto Rico

Before, Bingham, Morton and Morris, JJ.

OPINION OF THE COURT—February 12, 1936

MORTON, J.:

This is an appeal by the plaintiffs from a judgment of the Supreme Court of Puerto Rico dismissing their complaint. The facts are not now in dispute, the findings of the court of first instance, the District Court of San Juan, having been confirmed by the Supreme Court. The principal question is whether the plaintiffs' suit is barred by the short statute of limitations applying to redhibitory actions.

The plaintiffs contracted to buy from the defendant a herd of one hundred twenty-two dairy cattle for $18,000; the cattle were delivered, and the full agreed consideration was paid for them in cash and property. Within a short time it developed that many of the cattle were infected with tuberculosis, a contagious disease. Seventy-two of them died or had to be killed for that reason. The exact number infected at the time of delivery is not stated. In the

[fol. 54] opinion of the Supreme Court it is said, "from the evidence, that court (the District Court) had the right to find that a great number of the cows sold were affected by tuberculosis at the time of the sale." The plaintiffs tendered back the sound cattle and demanded the return of the entire consideration which had been paid for the herd. The tender and the demand having been refused by the defendant, the present suit was instituted.

The District Judge held that there had been a failure of consideration on the part of the defendant; that the plaintiffs were entitled to recover back the entire consideration which had been paid by them; and that the defendant should take back the remaining cattle. On the defendant's appeal this judgment was reversed by the Supreme Court of Puerto Rico which held that the plaintiffs' action did not rest on failure of consideration, but was redhibitory in character and was therefore subject to the forty day statute of limitation above referred to. As the action had not been brought within this period, judgment was given for the defendant, from which the present appeal was taken.

The provision of the Puerto Rico Code which in the opinion of the Supreme Court barred the plaintiff's action reads as follows:

"Sec. 1399. The redhibitory action, based on the vices or defects of animals, must be instituted within forty days, counted from their delivery to the vendee, unless, by reason of the customs in each locality, longer or shorter periods are established.

"This action in the sale of animals may only be enforced with regard to the vices and defects of the same, determined by law or by local customs."

This section relates only to redhibitory actions, and the principal point of controversy is whether the plaintiffs' action is of that character.

Redhibitory actions, as defined in the Supreme Court opinion, are those in which the vendee alleging a breach by the vendor of an express or implied warranty in a sale seeks to return the thing sold or part of the thing sold and to recover back all or a part of the price paid. See too Childs v. Wilson, 15 La. Ann. 512; Henderson v. Leona Rice Milling Co., 160 La. 597; s. c. 107 So. 459; and Enciclopedia [fol. 55] Juridica Espanola, Vol. XXVI, page 884, referred

to in the opinion of the Supreme Court. There appears to be no question but what a valid sale sufficient to support a warranty by the vendor is an essential foundation of an action of redhibition. In the present case the District Judge held that under section 1397 tuberculous cattle could not be the subject of a contract of sale, that there had been no sale of the infected cattle, that as to them the plaintiffs' action was not redhibitory, and that the plaintiffs were not obliged to accept the sound cattle delivered with the diseased ones, but might reject the whole delivery and recover the entire consideration. For cases resting on failure of consideration a different and much longer statute of limitations applies. The Supreme Court held that there had been a valid sale of the diseased cattle which the plaintiffs were seeking to rescind and that the action was redhibitory.

The question depends on the true construction of section 1397 which reads as follows:

"Animals and cattle suffering from contagious diseases shall not be the object of a contract of sale. Any contract made with regard to the same shall be void.

"A contract of sale of cattle and animals shall also be void, when the use or service for which they are acquired being stated, they are found to be useless therefor."

The Supreme Court, following the commentator Scaevola, held that this section did not *not* make contracts for the sale of tuberculous cattle void, but only voidable, subject to rescission at the option of the vendee; that if the vendee elected to rescind he must return to the vendor the tuberculous cattle; that the action was accordingly redhibitory and was barred by section 1399, supra.

This construction does great violence to the language used. It completely ignores the first sentence of the section, viz., that "animals and cattle suffering from contagious diseases shall not be the object of a contract of sale," and it reads "void" as "voidable." Other sections of the Code deal with the same subject matter, i. e., cattle [fol. 56] infected with contagious diseases, and must be considered in this connection.

"Section 351. Any person who shall knowingly sell, or offer for sale, or use, or expose, or who shall cause or procure to be sold or offered for sale, or used, or exposed any horse, mule, or other animal having the disease known as

glanders, or any other contagious or infectious disease, shall be guilty of a misdemeanor. (Rev. Stat. 5803.)

"Section 352. Every animal having glanders or any other contagious or infectious disease shall at once be deprived of life by the owner or person having charge thereof, upon discovery or knowledge of its condition; and any such owner or person omitting or refusing to comply with the provisions of this section shall be guilty of a misdemeanor." (Rev. Stat. 5804.)

"Section 356. Every person who owns or has the custody of any cattle, horses, mules or asses infected with a contagious disease, and fails to immediately report the same to the insular health authorities, or conceals the existence of such disease, or attempts so to do, or wilfully obstructs or resists the said health authorities in the discharge of his (their) duty as provided by law, or sells, gives away or uses the meat or milk, or removes the skin or any part of such animal, is punishable by fine not exceeding three hundred dollars or imprisonment in jail not exceeding one year, or both, in the discretion of the court."

"(Law of March 14, 1907.) Every person who knowingly sells or disposes of to another person any animal infected with or laboring under any infectious or contagious disease, or the meat, skin, hide, horns, hoofs, or any other part of an animal infected with or laboring under any infectious or contagious disease at the time of its death, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a fine of not less than one hundred dollars and not more than one thousand dollars or imprisonment in jail for not less than one month, nor more than one year, or to both such fine and imprisonment." (Rev. Stat. 118.)

These sections, in connection with others which it is unnecessary to quote, taken together, form a plan for dealing with the menace to public health occasioned by diseased animals. Section 1397 is obviously an integral part of this plan and should be so considered. The Supreme Court of [fol. 57] Puerto Rico does not seem to have had this aspect of the matter in mind. It is not referred to in the opinion, nor are the sections just quoted referred to. It is said by the court that the purchaser of a cow upon discovering that she has incipient tuberculosis has an election whether to keep her or to return her to the vendor. "To recover the

price, he must return the animal. It is entirely at his election to retain the cow." These views cannot be reconciled with the provisions of the sections above quoted which make criminal the sale or use of infected cattle knowing them to be so, and require the custodian of cattle found to be infected to kill them at once. It is contended by the appellants that the great weight of opinion by the commentators on the Spanish and other codes which contain sections substantially like 1397 is adverse to Scaevola's view on this point, and to the view taken by the Supreme Court of Puerto Rico. We do not think it necessary to consider this aspect of the matter; nor indeed upon such a question should we set our judgment against that of the Supreme Court of Puerto Rico. We recognize that the question before us is one on which the opinion of that court carries great weight and ought not to be set aside unless demonstrably erroneous; and we bear in mind the caution which must be exercised in dealing with such matters. Fernandez v. Ayllon y Ojeda, 266 U. S. 144, 146. But we see no escape from the conclusion that the Supreme Court of Puerto Rico overlooked important provisions of law and erred in disregarding the plain language of section 1397. There is no suggestion that the language of the section is ambiguous, but only that it is ill-advised and mistaken. In Helvering v. City Bank Farmers Trust Co., United States Supreme Court, November 11, 1935, it was said, "We are not at liberty to construe language so plain as to need no construction." We do not understand that the Supreme Court of Puerto Rico has greater powers. See too Thompson v. United States, 246 U. S. 547, 551.

We think it clear that cattle having contagious diseases are, in Puerto Rico, out of the commerce of man and cannot be made the object of a contract of sale. In attempted sales of such cattle no contract arises because there is [fol. 58] no "definite object which may be the subject of the contract" as required by section 1228. There being no contract there is nothing to rescind and, no property being in the vendee's possession that can lawfully be returned, there is nothing to return. There being no contract of sale on which a warranty, express or statutory, could rest, an action to recover back the price would not be redhibitory, and the prescription period of forty days or of six months (Sec. 1393) would not apply. Furthermore,

under the law of Puerto Rico when a contract lacks any one of the essentials prescribed in section 1228, no contract exists; and no declaration of nullity is necessary before an action may be brought to recover the price. See Valiente & Co. v. Succession of Abdon Fuentes Marrero, 76 Fed. (2d), 78 (C. C. A. 1). The deliveries of tuberculous cattle by the defendant to the plaintiffs amounted to nothing at all; and the payments made for them by the vendee in money and property were entirely without consideration. The action to recover such payments is not a redhibitory action and is not limited by the forty day provision of section 1399 or by the six months provision of section 1393.

If the herd of cattle which were sold be regarded as a unit and as the thing which was sold, a different result would be reached because about fifty of the cattle were sound and were legítimate objects of sale. The thing sold was not therefore completely unlawful as an object of commerce; the good portion of it would pass to the vendee and would have to be returned by him if he elected to rescind; the action would be redhibitory in character and would be limited by the provisions of section 1399. The Supreme Court of Puerto Rico did not however so regard the transaction. It said, "We have the idea that when cattle are sold, even for a dairy, the animals are sold individually. It is a distributive sale. It makes no difference that the sale was for a lump sum. With the exceptions noted in the chapter, only the cattle affected with a redhibitory vice",—the Supreme Court regarded tuberculosis as being of that character,—"under all the codes and the commentators that we have seen, may be returned." * * * "*The defendant had a clear right to insist that the contract was good for the cattle that were sound.* * * * Before [fol. 59] concluding this opinion we desire to say, and this appears possibly from our general considerations, that *the plaintiffs never had the right to the cancellation of the whole contract, but only to bring a redhibitory action for the animals that were suffering from or died of a contagious disease.*" (Italics supplied.)

There are great difficulties in dealing with the sale of a herd of cattle for dairy purposes as a unitary thing on questions of this character. The views of the Supreme Court of Puerto Rico on this point certainly cannot be said to be clearly wrong.

To summarize: In the trial court the plaintiffs put their claim on the herd basis; they endeavored to rescind the entire transaction and get back the full consideration which had been paid; and they were held entitled to do so. On appeal the Supreme Court held that the sale could not be given this unitary character, but must be considered with respect to the individual animals,—and that view stands. In its decision that, as to the tuberculous cattle, a contract was entered into and the plaintiffs' rights were of redhibitory character and subject to the limitation of section 1399, the Supreme Court fell into error.

It follows that the judgment appealed from must be reversed and the cause remanded to the District Court of San Juan with instructions to permit the plaintiffs to amend if they are so advised. As we understand the opinion of the Supreme Court this is the result which would have been reached in that court if section 1397 had been given what we hold to be the necessary construction of it. At any rate it is the just result.

The judgment of the Supreme Court of Puerto Rico is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion; the appellants recover costs of appeal.

[fol. 60] In United States Circuit Court of Appeals

Dissenting Opinion

Bingham, J. (dissenting):

This is an appeal from a judgment of the Supreme Court of Puerto Rico of April 6, 1934, reversing a judgment of the District Court of San Juan of January 12, 1931, and dismissing the complaint.

The complaint was filed in the District Court of San Juan December 12, 1929. It was brought by Jose Roman Alonso and Manuel Alonso Monoz, sole members of Alonso Hermanos, a civil agricultural partnership, against Jose Matos, in which it was alleged that on March 1, 1929, the plaintiffs entered into a contract in which the defendant was to sell 122 head of cattle, of different genders, to the plaintiffs for the lump sum of $18,000; that the plaintiffs took possession of the cattle, agreeing to pay therefor as follows:

$3,000 in cash on the date of the contract; $5,000 by the transfer of an urban piece of property; and the balance of $10,000 to be paid within two years, expiring March 1, 1931, with interest at 9 per cent per annum, payable monthly, and to secure the $10,000 by a mortgage of property owned by Jose and Manuel; that on the date of the sale the cattle were apparently in good condition; that no notice to the contrary was given by the defendant to the plaintiffs, who had no knowledge of or experience in veterinary matters and were unable to discover at sight whether the cattle were suffering from any hidden disease; that long prior to March 1, 1929, the cattle thus sold were suffering from tuberculosis, a contagious disease; and that from March 18 to December 6, 1929, 43 of the cattle died of the disease (specifying the date of the death of each one and its color or marks); that, after a tuberculine test was made of the cattle, it was found that 29 more were affected with tuberculosis, contracted prior to the sale; and that the plaintiffs stand ready and willing to return to the defendant (and offer so to do) all the surviving cattle.

The prayer was that the court enter judgment declaring null and void, in accordance with Section 1397 of the Revised Civil Code, the contract for the sale of the cattle of March 1, 1929, and the mortgage securing the balance of $10,000; that the entries of the mortgage deed in the Reg- [fol. 61] istry of Property of San Juan be cancelled; that the plaintiffs recover of the defendant the sum of $8,000 paid for the cattle; and that the defendant pay costs and disbursements, etc.

In his answer the defendant admitted the making of the contract; that the plaintiff paid the first installment of $3,000 in cash and the second installment of $5,000 with the urban property transferred to him; and admitted that the plaintiffs agreed to pay the remaining $10,000 within two years with interest, which obligation was secured by the mortgage as alleged; but denied each and every other allegation of the complaint. He alleged as new matter that the cattle, on the date of the sale, were without vice or disease, occult or apparent, and were sold by him acting in good faith; that subsequent to the sale some of the cattle became affected with tuberculosis due to the fault of the plaintiffs in not properly feeding and housing them; and, as a special defense, among others, alleged that, if the plaintiffs had a

cause of action, it had prescribed, inasmuch as it was brought after the expiration of forty days from the delivery of the cattle, under Section 1399 of the Revised Civil Code.

In the District Court it was found that the cattle were to be used for dairy purposes; that 43 died and 29 were killed by the sanitary authorities due to their having tuberculosis; that the cattle died of a contagious disease; that those that were killed were first treated with the tuberculine test and the result was positive reaction; that the place to which the cattle were taken was in fair hygienic condition and had sufficient water; that the autopsy practiced on some of the cows showed that a chronic cavernous condition existed which indicated that the cattle had been sick for a number of months; and that, at the time of the sale, part of the cattle was suffering from a contagious disease.

The District Court was of the opinion that, inasmuch as some of the cows were suffering from a contagious disease at the time of the sale, the object of the contract as a whole was wanting and the contract was null and inexistent; that the action set out in the complaint was not a redhibitory one; that it had not prescribed under Section 1399 of the [fol. 62] Civil Code; that that section was not absolutely mandatory; that, being of the opinion that the contract "never had any existence because it lacked one of the essential elements for its validity, the term to allege its nullity * * * [was] not limited by any period of prescription"; and that the injured party was only required to claim the inexistence of the contract with reasonable diligence.

In the Supreme Court of Puerto Rico that court, after reviewing the evidence, reached the conclusion that the District Court "had a right to find that a great number of cows sold were affected by tuberculosis at the time of the sale"; that "the preponderance of the evidence satisfies us that the disease was not contracted after the sale, at least with respect to a number of the cows"; that the disease "existing, as it did in some cases in an advanced form the court had the right to decide the facts as it did."

It said that the plaintiffs' contention was that the action was based exclusively upon the idea that the sale was completely null and void and inexistent because a great part of the cattle was affected by tuberculosis at the time of the

sale, and came within the provisions of Section 1397 of the Civil Code, which reads:

"Sec. 1397. Animals and cattle suffering from contagious diseases shall not be the object of a contract of sale. Any contract made with regard to the same shall be void.

"A contract of sale of cattle and animals shall also be void, when the use or service for which they are acquired being stated, they are found to be useless therefor."

After stating that tuberculosis was a contagious disease within the meaning of Section 1397, the court in considering that section stated that its provisions were the same as those of Section 1494 of the Spanish Civil Code of 1889; that the Spanish Code of 1889 was extended that year to Puerto Rico and was adopted in 1902 as its Civil Code; that the history of legislation in regard to vices of a thing sold for which a vendor gave a warranty shows that the vices in animals giving rise to a cause of action were characterized as redhibitory; that this was true from the time of the Ediles at Rome; that the "Latin word redhibitio means a return of the thing sold, or sometimes of part of [fol. 63] the thing sold, with a right to obtain all or a part of the price paid"; that "a vice in an animal causing the annulment or rescission of a sale has always been considered as redhibitory, at least up to the enactment of the Civil Code of Spain of 1889," in which year Sections 1397 and 1399 were added; that the plaintiffs' learned counsel "realized that in order to have a possibility of success in their suit they were bound to return or offer to return the animals, the subject of the contract, *whether diseased or not,*" and for this reason offered to return the cows that remained in their possession; that the action stated in the complaint was necessarily a redhibitory action, "whatever else it may be characterized or whatever else may be the effect of Section 1397"; also that the "action is a redhibitory one, whether the thing attempted to be sold can or cannot be the subject of a contract by reason of Section 1397"; that the court had come to the same conclusion with Scaevola that "Homer slept" when the legislature of Spain enacted Section 1494 of the Spanish Code of 1889 (which is the same as Section 1397 of the Civil Code of Puerto Rico); that the word "void" means "voidable" and the ac-

tion is redhibitory; that in Section 1397 (Spanish 1494) the legislature "necessarily * * * meant to say that a contract could be rescinded or annulled as in other redhibitory actions, and that Section 1397 does not exclude the *transaction made in this case* from the field of *warranty.*" In other words, that there was an existing contract of sale to which the warranty could attach and having reached the conclusion, that the allegations of the plaintiffs' complaint disclosed that it was a redhibitory action because the facts found (that 72 of the cattle included in the contract had a contagious disease and the remaining 50 were sound) necessarily rendered it redhibitory, that there was an existing contract of sale because the 50 sound cows would constitute the object of a contract, and that a rescission of it was necessary and required a return of the 50 sound cows to the vendor, the court proceeded to consider what it deemed the principal question in the case—whether the provision of 40 days within which to bring the action provided for in Section 1399 of the Civil Code of Puerto Rico and [fol. 64] Article 1496 of the Civil Code of Spain applied, and held that it did. And, it appearing that the plaintiffs' action was not brought until December 12, 1929, some ten months after the making of the contract and the delivery of the cattle, it ordered the action dismissed.

After a careful consideration of the matter I am of the opinion that, as applied to the allegations of the complaint and the specific facts found in this case, the court did not err either in holding that the action was redhibitory or that the right to prosecute it was barred.

But I think there are statements in the opinion, not necessary to the decision in the case, that go too far, for the provisions of Section 1397 of the Civil Code of Puerto Rico (Article 1494 of the Spanish Code) are not necessarily restricted to a redhibitory action, even though that section is included among other sections of the Code, the preface of which is "Warranty against hidden defects of or burdens of the thing sold."

The Civil Code of Puerto Rico in Sections 1228 and 1238, which correspond to Articles 1261 and 1271 of the Spanish Civil Code, provide:

"Sec. 1228. There is *no contract* unless the following requisites exist:

1. The consent of the contracting parties.

2. A definite object which may be the subject of the contract.

3. The cause for the obligation which may be established."

"Sec. 1238.—All things, even future ones, *which are not out of the commerce of man*, may be objects of contracts."

Section 1397 of the Civil Code, as we have seen, provides that "animals and cattle suffering from contagious diseases shall *not be the object* of a contract of sale."

Section 351 of the Penal Code makes the sale, use or exposure of an animal having a contagious disease, if knowingly done, a crime; and Section 352 of that Code provides that every animal having such a disease "shall at once be deprived of life by the owner or person having charge thereof, upon discovery or knowledge of its condition; and any such owner or person omitting or refusing to comply with the provisions of this section shall be guilty of a mis- [fol. 65] demeanor." Similar provisions are found in Sections 118, 121 and 122 of the Revised Statutes of Puerto Rico (Sections 4, 7 and 8 of the Act of March 4, 1907).

There can be no doubt, therefore, that cattle having a contagious disease are in Puerto Rico out of the commerce of man and cannot be made the object of a contract of sale; that, where a single animal having a contagious disease, or where several animals all having a contagious disease, are attempted to be sold, no contract of sale arises or can exist, for in neither case is there a lawful object of a contract and the attempted contract, under the provisions of Section 1228, is non-existent. Being non-existent there is nothing to rescind and, no property being in the vendee's possession that can lawfully be returned, there is nothing to return; there being no contract of sale there is nothing out of which a warranty, express or statutory, can arise, or to which it can attach, and an action to recover the price paid would not be redhibitory and the prescription periods of 40 days or of 6 months would not apply. Furthermore, under the law of Puerto Rico, when a contract lacks any one of the essentials prescribed in Section 1228, so that no contract exists, no declaration of nullity is necessary before an action may be brought to recover the price.

In Valiente & Company v. Succession of Abdon Fuentes Marrero, 76 Fed. (2d) 78, this court said:

"It may be said, as heretofore pointed out, that under Section 1228 of the Civil Code of Puerto Rico no contract exists where consent of the contracting parties is wanting [or where the object of a contract is wanting]; that such a contract is non-existent and void, and a decree of nullity under Section 1268 is not required, for the reason that that section, when read in connection with Section 1267, is called into play only in the case of contracts *containing the requisites mentioned* in Section 1228. Gonzalez et al. v. Fumero et al., 38 P. R. R. 497, and cases there cited."

And the Supreme Court of Puerto Rico, in the above cited case of Gonzalez v. Fumero, in construing Section 1228 of their Civil Code, said:

"The phrase 'there is no contract' excludes from that [fol. 66] juridical qualification everything outside of the concurrence of the three requisites. If one of them is missing the contract is not born and does not become real."

It appears from what has been said that cases may arise where the facts are such that the express language of Section 1397 will be applicable and an action will lie for the price paid without a redhibitory action or a prior suit for a declaration of nullity.

On the facts in this case, there being an existing contract to which a warranty attached the plaintiffs had their election (Civil Code, Sec. 1389) to sue on the warranty and recover the damages they sustained by its breach, or to return the sound cattle and recover the price paid. If they sued on the warranty, they had to bring their action within six months from the day of the delivery of the cattle (Civil Code, Sec. 1393). If they sought to rescind the contract they had to bring their action within forty days (Civil Code, Sec. 1399). See Record, page 40. The plaintiffs did not bring their action for more than ten months after the delivery of the cattle.

My associates apparently think that, although there was an existing contract of sale to which a warranty attached and on which warranty an action must be brought, if at all, within six months after delivery of the things sold, the plaintiffs nevertheless have six years within which to sue for money had and received, as if there were 122 distinct

contracts of sale in each of which there was a fixed sum agreed upon and paid for each of the cows, diseased or sound, and that an action for money had and received can be maintained for the price of the diseased ones, although there was no distinct price agreed upon for each cow. It is perfectly apparent that an action for money had and received would not lie under the circumstances here disclosed and that it should not be held to lie in this case, for it would be substituting an action for money had and received for an action for damages, which the warranty provided for, and extending the period within which suit might be brought from six months to six years.

In any event it certainly cannot be said that, as applied [fol. 67] to the plaintiffs' declaration and the particular facts of this case, the Supreme Court of Puerto Rico was clearly wrong in holding that the plaintiffs' action was redhibitory and, under the provisions of the Code, should have been brought within forty days after the delivery of the cattle. Diaz v. Gonzalez, 261 U. S. 102.

[fol. 68] RECITAL AS TO SUBSTITUTE BOND

On April 16, 1935, by stipulation a substitute supersedeas bond was filed and approved.

RECITAL AS TO HEARING

Thereafter, to wit, on October 15 and 16, 1935, this cause came on to be heard and was fully heard by the court, Honorable George H. Bingham and Honorable James M. Morton, Jr., Circuit Judges, and Honorable George F. Morris, District Judge, sitting.

Thereafter, to wit on February 12, 1936, the opinion of the court (page 53) and a dissenting opinion, Bingham, J., (page 60) were filed and the following Judgment was entered:

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—February 12, 1936

This cause came on to be heard October 15 and 16, 1935, upon the transcript of record of the Supreme Court of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now, to wit, February 12, 1936, here ordered, adjudged and decreed as follows: The judgment of the Supreme Court of Puerto Rico is reversed and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day; the appellants recover costs of appeal.

By the Court.

Arthur I. Charron, Clerk.

Thereafter, to wit, on March 28, 1936, within time duly extended by the court, the following Petition for Rehearing was filed by appellee:

IN UNITED STATES CIRCUIT COURT OF APPEALS

APPELLEE'S PETITION FOR REHEARING—Filed March 28, 1936

Jose Matos, appellee, respectfully petitions this Honorable Court for a rehearing in the above-entitled case, wherein this court reversed the decree of the Supreme Court of Puerto Rico and remanded the case with instructions to permit the plaintiffs to amend if they are so advised.

The grounds upon which a rehearing is requested are as follows:

1. That, in deciding and ruling that certain provisions of [fol. 69] the Penal Code of Puerto Rico must be taken into consideration in this case, in connection with section 1397 of the Civil Code of Puerto Rico, on which the plaintiffs have based their action herein, and in declaring in effect that the Supreme Court of Puerto Rico had not had in mind the said provisions nor referred to the same in its decision, this Honorable Court overlooked the fact that this question of the relevancy of those provisions was raised, for the

first time, by the appellants in their motion for reconsideration submitted before said Supreme Court, and that that court did consider such question and rejected appellants' contentions on this point, in an opinion denying said motion for reconsideration, which opinion was mentioned by the appellants in their petition for appeal and in their brief, submitted to this Honorable Court, and was made a part of the original or typewritten transcript of record but excluded by the appellants (over appellee's objection) from the printed record of appeal filed in this court.

2. That, in deciding and ruling that said section 1397 of the Civil Code of Puerto Rico, which formed the basis of plaintiffs' action in this case, must be construed in connection with the sections of the Penal Code of Puerto Rico and other special laws relating to the sale, disposal or use of infected cattle knowing them to be so, this court overlooked and failed to give effect to applicable rules of statutory construction under which the language of said section 1397 should be interpreted independently of such penal provisions and in the light of other germane provisions enacted in the same title and chapter of the Civil Code where that section appears, and, further, with reference to the antecedents or history of the civil legislation involved and the opinions of civil law commentators on such legislation.

3. That, in remanding the cause herein with instructions to permit the plaintiffs, appellants, to amend, this court overlooked the constant theory and position maintained by said plaintiffs, appellants, throughout the proceedings successively had in this case before the District Court of San Juan, the Supreme Court of Puerto Rico, and this Honorable Circuit Court of Appeals, which theory and position are in conflict with the right to amend granted to the said [fol. 70] plaintiffs enabling them, in effect, at this stage of the litigation herein, some six years after the same originated, to make an entirely different case and to revive a cause of action which they discarded by their own deliberate choice; all to the prejudice of appellee's rights, including the right to invoke the defense of res judicata at the proper time and, similarly, to oppose on proper grounds before the District Court of San Juan, the granting of what would be tantamount to a new trial.

4. That, in applying section 1397 of the Civil Code of Puerto Rico to this case as authorizing a recovery in regard to the diseased cattle on the theory of the inexistence of a contract as to such cattle, notwithstanding the established fact that a large number of the animals, sold as a herd and for a lump sum, were sound, this court overlooked and failed to give effect to applicable principles of the civil law, in accordance with which the said section 1397, even if its language is to be literally interpreted as prescribing the nullity or inexistence of particular contracts, must be held as inapplicable to cases where not all but only a portion of the animals sold are defective in the sense expressed in the enactment.

Heriberto Torres Sola, Attorney for Defendant, Appellee. Ralph Bosch, of Counsel, New York City.

I, Heriberto Torres Sola, attorney for appellee, hereby certify that I am of the opinion that there is probable ground for the above petition and that it is brought in good faith and is not intended for delay.

Heriberto Torres Sola, Attorney for Defendant, Appellee.

[fol. 71] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—April 30, 1936

The petition for rehearing filed March 28, 1936, is hereby denied.

By the Court.

Arthur I. Charron, Clerk.

Recital as to Order Staying Mandate

Thereafter, to wit, on May 18, 1936, mandate was stayed until further order of court.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 72] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 40,767. U. S. Circuit Court of Appeals, First Circuit. Term No. 227. Jose Matos, Petitioner, vs. Alonso Hermanos, et al. Petition for a writ of certiorari and exhibit thereto. Filed July 24, 1936. Term No. 227, O. T., 1936.

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